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AN EDITORIAL

THE BEGINNING of a new year is traditionally a time for re-evaluation of trends and expressions of hope that errors of the past will not be repeated. It may be true, as cynics say, that New Year's resolutions are often forgotten before the winter's snows are gone. But it is also true, for organizations and movements no less than for individuals, that where the will to reform is present it may be rewarding to pay some attention to areas where correction of faults is both possible and necessary.

One such area of reform was dealt with editorially in the last issue of *The Arbitration Journal,* under the heading of "Creeping Legalism in Labor Arbitration." Somewhat related to that discussion, and for the sake of a more rounded view of challengeable trends, we present below excerpts from an address by AAA Vice President Joseph S. Murphy at the 11th Annual Conference on Labor at New York University. It has just appeared as a chapter in a book, published by Matthew Bender & Co.

"*Selection of Arbitrators.* One wonders whether past years have taught parties better methods of appraisal in the selection of arbitrators. Unquestionably, the labeling of arbitrators as 'pro-labor' or 'pro-management' has long since gone out of existence. As a matter of fact, the pro-labor or pro-management arbitrator, lacking the elusive quality of acceptability by both sides, has practically ceased to exist. The box score method of appraising arbitrators is no longer used, if, indeed, it ever was. The fundamental qualifications to look for in an arbitrator are integrity, proper knowledge of the particular issues which are to be presented to him, courage, and good old American 'guts' to make decisions in the face of pressures which unfortunately still arise. In addition, the arbitrator should have an independence of thought and the quality of decisiveness to make decisions within a reasonable period of time. Years ago, men without specific experience in arbitration were able to enter the field. But now, both labor and management seem to decry the small pool of available arbitrators and, the next moment, refuse to accept any new names for their case, complaining 'Why should I be the first to try him out?' The problem of a sufficient number of arbitrators has not yet been solved. It must be resolved in the coming years if the arbitration

process is to continue, independent and free with regard to choice of arbitrators."

"*Costs.* Related to the matter of the selection of arbitrators is the problem of fees. In analyzing the expenses for actual arbitration, parties too often concentrate on direct expenditures—the arbitrator's fee, arbitrator's expenses, administrative fees, if any, and outside counsel, if any. The type of high fee that disturbs the parties particularly is that which an arbitrator charges for his study days. A very small number of arbitrators will attempt to charge as much for study days as they believe the particular traffic will bear. When a man charges $100 a day for one day of hearing in a simple case and consistently charges for three, four or five days of 'thinking time' or 'rocking chair time,' the parties have a right to object and, what is more, to object by removing that elusive quality of acceptability. Padded awards with opinions which relate parties' contentions at great length are naturally not palatable, but parties will sometimes

(*Continued on Page* 219)

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WAYNE E. HOWARD is known to readers of *The Arbitration Journal* through his article, "Determination of Ability", two years ago. His article in this issue, as well as the earlier one, is adapted from a doctoral thesis he presented to the faculty of the Wharton School of Finance and Commerce, University of Pennsylvania, where Dr. Howard now teaches.

CRITERIA OF ABILITY

by Wayne E. Howard

Introduction

The problem of developing acceptable criteria upon which to evaluate employee ability is of great concern to management. Since it is well established that, in the absence of contrary contract language or past practice, management has the authority to determine the ability of its employees, such authority imposes a responsibility to make such determinations on the basis of sound standards. Before discussing the acceptability of the various criteria, it is necessary to review the general nature of the ability which is being evaluated. It is axiomatic that unless we know what we are measuring, it is impossible to develop standards for its measurement.

Arbitrators have held that ability means the ability present in the employee at the time he is being considered for a job vacancy. Present ability is measured against the requirements of the job as they exist at the time the job is vacant.[1] The employee must be able to carry out all the duties of the job, not merely some of them. Excess ability over the amount required to carry out the duties of the job may not be considered. Thus, standards for evaluating the ability of employees must be oriented to assess the present qualifications of the employee against the present qualifications demanded in the job.

The manner in which any criteria are applied is also governed by the degree to which ability may be taken into consideration under the provisions of the collective bargaining agreement. Where ability receives primary consideration under the labor contract, that employee who clearly scores highest, when his individual qualifications are

1. In re Fruehauf Trailer Co., 11 LA 495; McLouth Steel Corp., 11 LA 805; North American Cement Corp., 11 LA 1109; Standard Forgings Corp., 15 LA 636; Illinois Malleable Iron Co., 16 LA 909; Universal Atlas Cement Co., 17 LA 755; Quaker Shipyard and Machine Co., 19 LA 883; Wagner Electric Corp., 20 LA 768; Pittsburgh Steel Co., 21 LA 565; John Deere Des Moines Works, 22 LA 274; Cameron Iron Works, Inc., 23 LA 51.

matched against the requirements of the job, may be given the vacancy regardless of his seniority standing. Under contract provisions whereby ability and seniority are given equal consideration, the relative abilities of employees, as determined by the criteria developed in individual instances, must be compared against differences in their seniority standings. Thus the standards set up to measure ability give only a partial answer to the question of filling vacancies. Where the collective agreement merely provides for sufficient ability, the criteria must be directed to determine whether the most senior employee has the qualifications to satisfy the job requirements.

The degree of scrutiny to which any of the criteria may be subjected by an individual arbitrator is also dependent upon his beliefs as to the grounds upon which a management determination should be upset.[2] An arbitrator who believes that management action in this area should not be overruled without clear evidence of arbitrary, discriminatory, or capricious action is likely to pay less attention to how well the criteria relate to the work situation, and greater attention to whether it was applied fairly over the affected employees. Another arbitrator, who believes that management has the duty of proving a fair evaluation of its employees' ability, may subject the criteria selected by management to greater scrutiny. In addition, he may determine how well the criteria relate to the individual job requirements for which they were designed to screen candidates.

Criteria Provided in the Agreement

Few collective bargaining agreements spell out the specific criteria by which management shall assess ability.[3] There are, in fact, strong grounds for not including a statement of the criteria in the agreement. In the first place, such inclusion would make it difficult to relate the criteria to individual jobs. Obviously one set of standards cannot measure the abilities needed throughout the full range of skills required by the typical plant. Experience and physical fitness may well qualify a man for a low-skilled occupation, whereas

2. See "Determination of Ability," *Arbitration Journal*, Vol. 12, No. 1, 1957 for a detailed treatment of this subject.
3. One exception to this statement is the 1949 contract between the Aviation Maintenance Corporation and the International Association of Machinists in which the criteria on which management was to evaluate ability for promotion to the job of leadman were stated in the contract. These criteria were tact, sound judgment, and leadership ability. This is particularly interesting because of the subjective nature of the standards selected.

training, education, and productivity may be necessary yardsticks for qualifying an employee for more highly skilled jobs. The desired flexibility, however, cannot be achieved through a codification of ability criteria in the labor agreement. Moreover, in some occupations, personal qualities such as attitude and personality may be more important than others. If specific criteria were listed in the agreement, management would require contractual authority to assess these subjective qualities, even when used in a restricted number of occupations. The union, however, would clearly oppose a general inclusion of subjective measures of ability. It is unlikely that any agreement of the parties could be obtained, and the alternative of drafting a long detailed list of the various criteria to be utilized in each series of occupations would prove particularly unwieldy.

Secondly, where the standards of evaluation are spelled out in the contract, they become difficult to change. This would prevent the improvement of standards where increased knowledge about the measurement of ability makes the old tests obsolete. Consent of the union would be required for such changes, and union pressure would most likely be focussed on decreasing the emphasis on ability rather than on improving the standards for its measurement.

In the third place, to codify the criteria on which ability should be measured comes close, in effect, to mutual determination of ability. Mutual consent on the standards of evaluation is but one step removed from mutual consent on ability; indeed, what remains after the criteria are developed is a mere mechanical procedure for applying them. Yet, it is clear that mutual determination of ability is fraught with great difficulties for both the company and the union.[4]

Standards Suggested For Ability Criteria

a. *Objectivity and Functional Fitness*

Arbitrators seem to lay down two general standards by which the criteria for determining ability of employees must themselves be judged: objectivity and validity.[5] The importance of each is obvious. To permit seniority to be limited by ability without requiring that the

4. *Arbitration Journal, op. cit.*, p. 15.
5. In re Central Screw Co., 11 LA 108; Copco Steel and Engineering Co., 12 LA 6; Public Service Electric and Gas Co., 12 LA 317; Mole-Richardson Co., 12 LA 427; Worth Steel Co., 12 LA 931; Libby, McNeill and Libby, 14 LA 316; Allied Chemical and Dye Corp., 14 LA 548; Campbell Soup Co., 19 LA 1; International Harvester Co., 20 LA 460.

criteria for determining ability be objective would contradict the basic aim of seniority itself, namely to avoid discrimination in the placement of personnel. On the other hand, to permit ability to be assessed in terms of criteria which have little relationship to capability would be idle, since presumably placement of personnel based on those criteria would be no better, and could be considerably worse, than sole reliance on seniority.

A basic problem then in determining the ability of employees is that of developing criteria which are both objective and relate directly to a man's present or expected future performance on a job. Can these two characteristics be satisfactorily blended in one standard? There has been some feeling among arbitrators that objectivity has been overstressed, and that ability is an over-all judgment factor not reducible to statistics.[6] This questioning attitude has for the most part been directed against the more complex types of criteria such as merit reviews and aptitude tests, where many individual factors are combined. The result expressed in these measures cannot be easily explained except in terms of factors, degrees, and weights, which often only a statistician can understand. The refinement of such techniques may create an illusion of precision, which is not borne out by an analysis of the factors taken under consideration, their relationship to performance on the job, and the manner in which they are weighted.

The arbitrator who is confronted with the problem of objectivity vs. validity finds himself in a dilemma. He does not develop criteria, but only rules upon their validity in the manner of an impartial referee. Where the parties themselves are not clear as to what they mean by ability, as evidenced in clashes over the placement of employees, and where this lack of clarity is evidenced in disputes over the proper criteria for its measurement, the arbitrator who attempts to suggest criteria which might have better functional fit, or reviews existing criteria on grounds of objectivity or validity, is likely to be considered a "meddler" or "industrial doctor." Furthermore, there

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6. Discussion by John A. Hogan before the National Academy of Arbitrators reported in *Arbitration Today,* Proceedings of the Eighth Annual Meeting, National Academy of Arbitrators, Boston, Mass., Jan. 27-28, 1955, McKelvey, Jean T., editor, B.N.A. Inc., Washington, D.C., 1955, p. 141. See also a similar summary of discussion by James C. Hill reported in *Management Rights and the Arbitration Process,* Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators, Cleveland, Ohio, January 26-28, 1956, Jean T. McKelvey, editor, BNA Inc., Washington, D.C., 1956, pp. 47-49.

are sound grounds for believing that such determination should be the responsibility of management and not that of an outsider with little knowledge of company problems. For these reasons, the arbitrator is more likely to favor objectivity than validity as a primary characteristic. To determine validity requires the arbitrator to subjectively evaluate what the parties meant by ability and then to assess, again subjectively, how well such criteria measure it. In carrying out this evaluation, he gets away from his position as the neutral referee, he feels, and assumes the position of an unwanted consultant.

The problem of objectivity, however, is not confined solely to the development or review of ability criteria, but is also important in their application to individual candidates for available jobs. This problem can be seen clearly where such criteria as absence and tardiness records or disciplinary violations are used. There is little question of the objectivity of attendance records or of recorded instances of disciplinary action. How shall such records be applied, however, in the case of an individual employee or a group of candidates for a job opening? Disciplinary records of rival candidates cannot be compared without a large degree of subjective analysis on the part of the employer or the arbitrator who reviews the determination. Absence and tardiness records likewise inevitably require some analysis as to their cause and whether such cause is excusable or inexcusable. The same questions arise where it is unnecessary to compare the ability of employees but only to determine whether a given employee has the requisite ability. In the absence of company norms, how much absence, lateness, or disciplinary demerits make a man unacceptable is a matter of subjective reasoning.

The problem of validity becomes more difficult to appraise when the ability of the employee is being assessed in terms of the requirements of a job upon which he has never been employed. This occurs not only in promotion but where under the layoff provisions of the contract, the employee has certain "bumping" rights which he may exercise on jobs performed by employees with less seniority than he. In these instances the predictability of ability becomes much more difficult. Where the content of such jobs differs considerably from that upon which the employee has been working, transfer of present skills on the new job may be questioned, and perhaps no criteria can substitute for the assessment of ability on the basis of an actual trial on the new position.

b. *Simplicity and Ease of Application*

In view of the difficulties mentioned above, the writer believes that there may be sound argument for advancing two other standards on which ability criteria should be judged: simplicity and ease of application. Ability cannot be precisely defined. The search for objectivity and validity has in part resulted in the development of complex criteria which cannot be easily understood. These criteria may create an illusion of precision, and, indeed, where challenged may defeat the aim of objectivity because so much subjective analysis is required to resolve the issue. Other criteria, while objective in terms of their development, may require subjective analysis to apply. Criteria which are simple and easy to apply are likely to be more objective, both in their development and application. Most important of all, they will be better understood, and thus be more acceptable to the parties most concerned, the union and the company. In this way, perhaps more of the issues over measuring ability could be resolved by the parties themselves, and more satisfactory settlements could be achieved.

Evaluation of Specific Criteria

One difficulty in attempting to analyze the acceptability of specific criteria results from the fact that in many cases management determination has been based on a combination of several criteria. Under these conditions, the acceptability of a given standard cannot be concluded from the fact that it may be valid in combination with other criteria. Criteria which, standing alone, may be considered as merely indictative of ability, may be deemed determinative when reinforced by a sufficient number of other equally weak indicators.

Another problem in the analysis of acceptability of criteria is to carefully distinguish between the general validity of a specific standard and possible irregularity in its application. A given standard may be a completely valid measurement of ability, but management may have applied it incorrectly or interpreted the result incorrectly. Thus the mere fact that in a specific case a particular standard was found unacceptable tells little about its general validity. The facts surrounding its use must be examined to determine why such a standard was overruled.

a. *Production Records*

Production records are found in most enterprises and include any measurement of an employee's previous work output on his pre-

sent job. These records may be compared with output records of other employees or with established output norms of the company. The measurement may be in terms of specific instances wherein the employee failed to produce an acceptable quantity of work, or of the over-all output of a given employee, or even in terms of incentive earnings, where the wage rates of the firm are tied directly to individual productivity.

The characteristics of this standard which make it particularly acceptable are its objectivity and its validity. Production records are also simple and relatively easy to supply. Because of these characteristics it is probably one of the best tests of a man's ability on his present job. Since it measures the employee's past performance on his present job, rather than his capacity to perform new or different duties, it is more valid for determining ability in connection with job retention during a decrease in forces than for promotional opportunities.

Where the collective bargaining agreements require a comparison of abilities among candidates for a particular job, the question arises as to how great a difference in productivity must be shown to indicate a clear difference in ability. Obviously this is a judgment factor to be weighed by the arbitrator in the light of all the circumstances. This study provided no answer to this question. In one instance a determination based on a 17 percent differential was upheld.[7] In another, a determination based on a differential of less than five percent was overruled.[8] Where the collective bargaining agreement merely requires competency, a like question arises as to how far can an employee's production fall below company standards before he may be deemed incompetent. The study provided no answer to this question for the same reasons noted above. In one case, previous warnings for low production were held sufficient;[9] in another, failure to make the minimum wage under an incentive system was considered to indicate insufficient ability.[10]

One weakness of production records as a criterion may be an overemphasis on quantity of production and an insufficient amount of attention paid to product quality, machine care, scrap rate, and other associated factors. Perhaps the solution to this issue lies in developing more comprehensive production records than those which

7. In re Worth Steel Co., 12 LA 931.
8. In re United States Steel Corp., 22 LA 80.
9. In re United States Lime Corp., 23 LA 379.
10. In re Goodyear Clearwater Mills, No. 2, 11 LA 419.

merely report the physical quantity of output produced. Other limitations of production records result from the inability of all operations to be subjected to measurement, and in the limited predictability which these records offer for success in jobs of a substantially different character. The fact remains that some plants do not keep production records and that some jobs cannot be measured in terms of quantitative output. Where production cannot be measured easily or where the productivity of individual jobs varies widely, production records are of limited value. This condition may be improved through management's increasing interest in standardization and improvement in the techniques of production control, but the problem of unmeasurable job output is likely to be with us for many years. With respect to the placement of employees on new jobs, past performance has limited predictability of performance in the future. The problem may be minimized, however, through a more rational organization of promotion or bumping lines. The development of clear lines of promotion and demotion, where each particular job is rationally situated in terms of performance requirements with jobs above and below it, and where promotion and demotion are confined to these channels, may increase the predictability of production records in terms of expected performance.

b. *Experience*

Experience is the length of a man's service in a particular job, type of work, or occupation. It is distinguished from production records in that it does not indicate how well a man performed a given task, but only how long he performed it. In this sense, it may be the same as seniority. At first blush, justification for such a measure of ability seems to be a clear case of circular reasoning. The paradox can be easily explained, however, by the fact that seniority rights accorded by a given contract are often in terms of length of service in a given department or plant, or with a given employer. Thus seniority credits may be built up without the accumulation of any experience in a particular job or occupation, and conversely the more experienced employee in terms of a specific occupation may not be the senior. A given candidate for a particular opening may have had far greater experience in that particular job, but less plant or company seniority. An employee may have also gained experience in a manner that accords no seniority credit, such as by filling temporary openings for that job in the past or by gaining experience on a

similar job with some other employer. For these reasons experience and seniority are not identical, and the use of experience as a measure of ability to qualify the practice of seniority is perfectly logical.

Experience is clearly an objective measure; indeed, this is the argument on which the seniority principle is based. There is a considerable difference of opinion among arbitrators, however, as to whether it is directly related to ability. Some arbitrators have found it completely acceptable as the controlling standard for the measurement of ability;[11] in some instances arbitrators have utilized it as a standard when they have overruled management determinations based on other criteria.[12] Other arbitrators have accepted it in combination with other criteria, without commenting upon its specific validity.[13]

Another group of arbitrators have denied the use of experience as the sole test of ability, although they have deemed it acceptable when combined with other criteria in some cases.[14] Their condemnation of experience as a measure of ability is largely based upon the fact that experience alone cannot make a man able.

The objective nature of experience as well as its ease of measurement makes it one of the more popular tests of ability. The question of its relevancy to ability, however, makes it a somewhat less acceptable test than that of production records. Previous experience tends to have a wider application for measuring ability in terms of job requirements different from the one on which job candidates are presently employed. Thus, it is commonly used to measure ability for promotions or bumping opportunities under the layoff provisions of the bargaining agreement. Serious question might be made of the doctrine that experience on a given job has predictability in assessing future performance on a job of substantially different character. How-

11. In re Copco Steel and Engineering Co., 12 LA 6; Thor Corp., 14 LA 512. Experience was also accepted as a valid standard in four separate issues arbitrated between Pittsburgh Plate Glass Co. and Federation of Glass, Ceramic & Silica Sand Workers of America on March 18, 1947. (Available from union in mimeograph form.)
12. In re Goodyear Decatur Mills, 12 LA 682; United States Steel Corp., 22 LA 188; Poloron Products of Pennsylvania, Inc., 23 LA 789. In this connection, however, it must be kept in mind that because of its simplicity, it is one of the few tests which can be applied by the arbitrator himself without having been introduced by the parties into the evidence. The arbitrator is limited by the evidence and in the absence of production records, tests, merit rating sheets, etc. he cannot conjure up comparisons on these bases.
13. In re North American Aviation, Inc., 11 LA 312; Standard Forgings Corp., 15 LA 636.
14. In re Inland Steel Co., 16 LA 280; Seagrave Corp., 16 LA 410; Tin Processing Corp., 17 LA 193; Nickles Bakery, Inc., 17 LA 486.

ever, until management can develop objective, simple, and easily applied criteria, which have demonstrably greater validity with respect to all jobs which must be evaluated under the ability provisions, experience is likely to be retained as an important criterion because of its inherent advantages.

c. *Tests*

The tests which are utilized to measure ability may vary from simple literacy tests to rather complex trade tests formulated by educational institutions and government agencies. They may be administered in written form or as special work projects carried out under the supervision of a work inspector. Because of the wide variety of such tests and the great differences in their administration, the problem of acceptability in their use is more concerned with the specific content of individual tests and the particular manner of their application.

Most disputes center around two points: whether the content of a given test measures the ability requirements as related to the vacant job, and whether the test was administered fairly. Where tests seem to bear little relevance to the work to be performed, as in the case of aptitude and capacity tests, or where they relate to a man's possibilities for future promotions to jobs higher up the scale, arbitrators have challenged them.[15]

The increased use of tests reflects management's desire to measure ability objectively. Where the ability of the employee is assessed in terms of new job requirements, tests offer an objective manner of determining ability on the future job, a characteristic which is not well achieved by the use of production records or experience. Whether this pursuit of objectivity is realistic has been challenged lately by arbitrators themselves, who feel that their strength in this matter has caused personnel administrators to overlook their weakness in other directions.[16] One general weakness of tests commented upon has been the psychological attitude engendered in the employee when faced with the necessity of proving his ability by a written examination. Accordingly, the results may reflect fears and inhibitions rather than ability, a condition not unnoticed by academicians in the classroom. Other weaknesses noticed were confined largely to the construction of the tests: that test content was framed in too difficult a style

15. In re Campbell Soup Co., 19 LA 1; Mead Corp., 20 LA 25.
16. *Management Rights and the Arbitration Process, op. cit.*, pp. 47-49.

which may introduce an extraneous factor of reading ability for manual ability; that the subjects covered in the examination may have little bearing on the actual job content which reduces its predictive value in measuring ability; that the test may actually measure personality factors of the employee rather than his knowledge of the job. In brief, the tests have a tendency to measure aptitude and capacity for higher advancement rather than ability to perform a given job.

These weaknesses are the result of certain inherent factors in testing: the cost of formulating tests and the purpose for which such tests were originally designed. The cost of designing a particular test is large, and it is essentially a fixed cost. Thus the more generalized the test, the wider the possible use, and the lower the unit costs of development. It would be virtually impossible, for instance, from a cost standpoint for a given employer to develop an individual test for each job classification, or even for a family of similar job classifications. Nor would purchase of such a test from outside testing agencies solve the problem because of individual differences in job requirements among employers. Quite naturally then designers of tests have attempted to develop general characteristics which make for success in a relatively wide area of skills. In addition, ability testing received its initial application in industry by personnel departments interested in improving selection standards for original placement of employees and promotion to higher ranking jobs, where such placement and promotion were unencumbered by seniority rights. Aptitude, potential ability, and personality characteristics were considered personnel assets. Obviously, therefore, tests were designed to measure these characteristics. Their later adoption as criteria for measuring ability under the seniority provisions of a contract ignored the fact that, in many cases, as a result of the seniority rights bestowed upon the employee by contract, a much more restricted concept of ability had emerged. Thus, while tests may have merit for the purposes for which they were originally designed, their adoption as a criterion for measuring ability under the seniority provisions may leave much to be desired on the characteristic of validity.

While written test scores may be easily applied among the candidates for a job opening or against company "passing scores," they do not satisfy very well the characteristic of simplicity. The determination of what areas shall be examined, how the questions shall be phrased, and what weights shall be given to individual areas and questions requires specialized skills, and indeed subjective judgment.

The very attempt to achieve objectivity in tests may be self-defeating, for objectivity in application of the criteria is accompanied by subjectivity in the determination of the test itself. Furthermore, the more complex the construction of tests becomes, the less they are understood by the parties affected by them, management and the union, and the more they become the specialized province of the industrial psychologist and the personnel administrator. This state of affairs does not contribute to their acceptability, and could conceivably result in pressure for their abandonment as criteria on the part of line supervisors as well as the union.

One improvement in testing might be an increasing emphasis on manual as opposed to written tests. Manual demonstrations may take the form of special test projects, or merely consist of a trial period on the new job. In stressing the manual examination many of the weaknesses of testing may be overcome. Validity can be closely achieved in the development of the examination, for the test can be confined to performing under actual operating conditions the requirements of the prospective position. Moreover, the failure of an employee to pass such a demonstration can be seen in concrete and realistic terms, thus making resolution of disputes between the parties far easier to achieve.

d. *Training and Education*

The training and educational requirements include general educational requirements as well as the specialized training courses offered by the employer himself. The difficulty in their application as a measurement of ability stems from the indirect relationship between education and training on the one hand and ability on the other. Unless it can be shown that ability for a particular job cannot be achieved in any other way than through specialized training, or that the requirements of a particular job make necessary a certain level of formal education, such a standard for measuring ability is likely to be invalidated by the arbitrator. In one instance, vocational school training was disallowed as a criterion for ability to enter apprentice training.[17] In another, the completion of a break-in training course was upset by the arbitrator as a bar to promotion where the ability imparted by such training could be achieved through on-the-

17. In re Hershey Estates, 23 LA 101. What makes this case interesting was that such decision was rendered under a contract which provided that promotions were to be based on "length of service, *training*, and efficiency" (italics added).

job training.[18] Training must also be offered to employees on the same basis, if such training is to be used as a measure of ability.[19]

The criteria of training and education possess objectivity, simplicity and ease of application. The problem lies essentially in the area of validity. Two questions should be asked about these criteria: Is such training related to the job which is to be filled? Is it possible to achieve ability on such a job in any other manner? Unless both questions can be answered affirmatively, there is reason to believe that use of such criteria is not justified. If one believes that under a seniority system men should advance as far as their ability can take them, the denial of ability on the basis of arbitrary educational or training standards seems inequitable.

Where such criteria are broadly phrased, as at the completion of a given amount of general education, or the completion of a given apprenticeship program, it might be argued that they are necessary for administrative convenience. A high school education, for instance, presumes a minimum ability with respect to arithmetic, written communication, and oral command of language. To expect the employer to validate possession of these qualities through the use of other criteria might be placing a rather heavy burden on management's shoulders. Likewise, the successful completion of an apprenticeship program presumes a certain familiarity with and ability to perform a wide number of specific tasks associated with a general trade, which it would prove extremely unwieldy to measure individually. Where the job content requires a heterogeneous combination of minimum abilities, as in a salesman or clerk, general educational requirements may be defensible criteria. Where the job requirements are extremely variable and require all-around ability in a given trade, as in a machine shop, successful completion of an apprenticeship program may be an equally defensible standard.

However, where the training required is of a narrow specialized type which in most instances is offered by the employer himself, the use of such training as a criterion of ability should be carefully examined. Unless such training is open to all, how can seniority rights be preserved? Yet should such training be open to those who obviously do not have the ability to profit by it? Some other criteria must be developed to determine whether a man should be permitted to take a training course. In this sense training as a criterion does not grapple

18. In re United States Steel Corporation, 22 LA 188.
19. In re Poloron Products of Pennsylvania, Inc., 23 LA 789.

with the real issue of determining ability. Furthermore, assuming such training is related to the job in question, this training can often be achieved by other than a formal training program. Indeed, a more rational organization of promotional lines may eliminate the necessity for formal training, and substitute for it on-the-job training. Such training would not only be more directly connected with the requirements of future openings, but would better assure the employee that his inherent ability will be recognized.

e. *Absence, Tardiness, and Disciplinary Records*

The absence and tardiness records of an employee are sometimes used by the employer as a measurement of the employee's ability. While strictly speaking these records do not measure the ability of employees, they do in one sense measure the worth of an employee to his employer, for excessive absenteeism and tardiness create problems in manning operations. Arbitrators are not agreed as to whether unexcused absenteeism and tardiness standing alone is an acceptable standard of ability.[20] Where such records have been introduced along with other criteria, some arbitrators have found no fault with their acceptability.[21]

One issue in connection with the use of absenteeism as a determinant of ability has arisen in the case of excused absence, particularly where by contract union officials are allowed time off from their jobs to conduct union business. Under these conditions, arbitrators uniformly refuse to accept the employee's absence as a bar to promotion to more important jobs.[22]

Employers have at times attempted to use the disciplinary records of employees as a test of ability for promotion or placement upon new jobs under the bumping provisions of a contract, but such records have met with indifferent success. One arbitrator clearly pointed out that a man's temperament and previous work record, which had resulted in disciplinary action, did not necessarily indicate lack of ability.[23] On the other hand, one arbitrator stated that though ex-

20. In re Central Screw Co., 11 LA 108. In this case the arbitrator stated: "The terms 'ability and skill' do not under the contract encompass absenteeism." Contrariwise, another arbitrator held that excessive absence and tardiness was an acceptable measurement of ability. See In re Dow Chemical Co., 12 LA 1070.
21. In re Goodyear Clearwater Mills, No. 2, 11 LA 419; Allied Chemical and Dye Corp., 14 LA 548.
22. In re Goodyear Decatur Mills, 12 LA 682; Marlin-Rockwell Corp., 17 LA 254; Douglas Aircraft Co., Inc., 23 LA 786.
23. In re Copco Steel and Engineering Co., 13 LA 586.

perience alone was not controlling, reprimands for carelessness on a job are valid criteria in determining relative ability.[24] Presumably the acceptability of discipline records as a criterion for ability is related to the number of offenses and the seriousness of the offenses. But where the arbitrator gets into evaluating the contrasting disciplinary records of claimants to a vacant job, the outcome is anything but satisfactory. Certainly when an arbitrator goes so far as to interpret reliability for the employer in terms of the relative personal habits of his employees when the arbitrator has little knowledge of company operations or little knowledge of the employer's requirements, there may be grounds for the charge that the arbitrator is meddling and is playing "industrial doctor." At least, the objectivity of the criteria is seriously damaged by the arbitrator's subjective evaluation.

Absence, tardiness, and disciplinary records as criteria for ability create a number of thorny issues. In one sense, they indicate the relative worth of employees to the employer; in another, they are not strictly speaking measures of work performance. It is in discussing the merits of these criteria that we are particularly handicapped by the lack of precision in the definition of the term ability. If we orient our criteria in the direction of work performance, we can be reasonably objective, but only at the cost of overlooking personal qualities which may be of immeasurable value to the employer. If we orient our criteria in the direction of personal qualities, we may take the broadest concept of ability into account, but only at the cost of a general lack of precision in the application of the criteria.

One answer might be to ignore such disciplinary infractions for purposes of filling job vacancies, and handle them exclusively through regular disciplinary procedures. This, however, may deny to management the right to make use of one of its greatest rewards for meritorious conduct, and one of its most potent sanctions against the uncooperative employee. A better approach might be to consider such criteria of secondary importance, and not controlling in themselves. Where used to reinforce other criteria of ability, they may contribute greatly to revealing the over-all performance of the employee.

f. *Miscellaneous Criteria*

Employers have not always confined their determinations of ability to the previously mentioned criteria, but have at times relied upon

24. In re Inland Steel Co., 16 LA 280.

such standards as merit review sheets, age of the candidates, differences in wage rates paid to the candidates, their physical fitness, previous refusals to accept the same type of job, and personal characteristics which they feel make them less able. While they have not been used as frequently as other criteria, arbitrators have on occasion been faced with the problem of deciding on their merit.

Merit review ratings are a composite of many factors weighted in some predetermined fashion to indicate the all-around ability of the employee. Merit reviews may include such matters as attendance, punctuality, quantity of output, quality of output, knowledge of the job, personal chaarcteristics, capacity for advancement, and many others. These factors are then applied to individual employees, weighted, and the result is intended to approximate the relative performance of an employee upon his job. The problem for the arbitrator is essentially one of determining whether the qualities rated are those which reflect skill and ability according to the terms of the collective agreement. Where such has been the case, arbitrators have found no fault with merit rating as a criterion.[25]

Where age has been raised as a standard for determining ability, it must be proved that the age of the employee will have some reflection on an employee's ability to perform the job. In reality, age itself is not a valid criterion, but may be the underlying reason why such employee cannot be expected to carry out the duties of another job acceptably. Youth, therefore, is no criterion, but extreme old age has been accepted as a contributing factor where a new job requires far more attention than that which a superannuated employee may be expected to give.[26]

Wage rate differences have also been introduced as a reason for refusing employees advancement in line with their seniority. Where it is used to deny an employee the right to try out a new job, the wage rate difference between his present job and the new job must be great enough to indicate that it is unreasonable to expect him to possess those skills.[27] Where it is used to relate the relative abilities of rival candidates for the same vacancy and these candidates are

25. In re North American Aviation, Inc., 11 LA 312; Merrill-Stevens Drydock and Repair Co., 17 LA 516.
26. In re Central Screw Co., 11 LA 108; Emmons Loom Harness Co., 11 LA 409.
27. Thus in one case a rate difference of 50 percent was considered a valid reason for denying an employee the right to bump into a more highly skilled job, particularly when combined with the factor of superannuation. See In re Emmons Loom Harness Co., 11 LA 409.

performing work of the same general character in the same wage rate bracket, the payment of the top rate within the range to one employee was considered by the arbitrator to indicate his greater ability over candidates paid at lesser rates.[28]

Physical fitness has been interpreted to mean physical disabilities that detract from a man's ability to carry out the duties of the job.[29] Where an employee has in the past complained that certain work is contributing to his ill health, the employer is under no present duty to offer him such work in line with his seniority.[30] Where mere size and weight have been used as grounds for refusing to promote a man in line of seniority, one arbitrator upset such a standard.[31]

In some instances the employer has attempted to use as a criterion for measuring ability, the fact that an employee had turned down an opportunity to do similar work in the past, or the fact that the employee had previously requested a demotion from a similar job. Arbitrators have refused to accept this test of ability and have been careful to delineate between an employee's desires and his ability. A mere desire not to assume responsibilities of a job is not an admission that the applicant cannot assume them, nor is a previous turndown of an opportunity to do similar work grounds for believing the employee did not have the ability.[32] Nor can the fact that the employee failed to ask questions about a higher rated job constitute grounds for believing the employee lacked ability.[33]

Personal characteristics which may be undesirable can only be used to ignore seniority rights when it can be clearly shown that they will detract seriously from the employee's usefulness in the job in question. Employee attitudes are not controlling. A reputation for surliness, for example, was not considered a valid criterion for refusing a promotion.[34] Where, however, objective reports of an employee's excessive nervousness and excitability were offered as a basis for refusing promotion into a job where such traits could result in serious damage and create a possible safety hazard, promotion was denied.[35]

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28. In re Standard Forgings Co., 15 LA 636. In this case the payment of $1.79 per hour as against $1.635 per hour was accepted as indicative of greater ability on the job when combined with greater experience.
29. In re Universal Manufacturing Co., 13 LA 238; Seagrave Corp., 16 LA 410; Borg-Warner Corp., 16 LA 446.
30. In re Universal Manufacturing Co., 13 LA 238.
31. In re Seagrave Corp., 16 LA 410.
32. In re Seeger Refrigerator Co., 16 LA 525; Campbell Soup Co., 19 LA 1.
33. In re Alabama Power Co., 18 LA 24.
34. In re Bethlehem Steel Company, 19 LA 186.
35. In re Pacific Gas and Electric Co., 23 LA 556.

Use of Multiple Criteria

In the determination of employee ability, management should attempt to utilize more than a single standard of performance. In the first place, there is much merit in the claim that ability is an overall judgment. Therefore, the more criteria upon which a determination can be based, the more likely it is that a comprehensive evaluation of the affected employees has been reached. Secondly, as was noted above, each of the criteria has individual weaknesses, and where several criteria are utilized these weaknesses may be cancelled out, and the chances are that a better determination will have been reached.[36]

Where, however, the criteria themselves produce conflicting results in the determination of the ability of a given employee, the problem of determination becomes magnified. Ultimately, it may depend on the subjective evaluation of the criteria by management or the arbitrator. Perhaps in such instances where relative ability cannot be clearly proved under existing criteria, there should be complete reliance on seniority. For in those instances where the measures cannot clearly indicate the most able employee, or clearly indicate an employee lacks competency, management cannot claim to be greatly harmed by reliance on seniority alone.

36. It is interesting to note that of the forty-five cases dealing with specific criteria of ability, thirty cases offered only one standard of measurement. Of these thirty cases the management determination was upheld in fourteen cases. Of the fifteen cases offering multiple criteria, the management determination was upheld in nine cases. Such analysis, however, ignores the strength of the particular criteria offered, and also the very human fact that the weaker the particular criteria or the closer the relative position of contesting employees, the more criteria, even those of doubtful validity, the contending party is likely to offer as evidence.

AMERICAN ARBITRATION LAW AND THE UN CONVENTION

by John J. Czyzak
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For over thirty years the principal international arrangements relating to commercial arbitration have been the Geneva Convention of 1927 and the ancillary Geneva Protocol of 1923.[1] These instruments, taken as a unit, make provision for the recognition and enforcement both of foreign arbitral awards and of the agreements or contracts to arbitrate which underlie such awards. Although concluded under League of Nations auspices, the Convention and Protocol have had little more than regional significance. Few countries outside of Europe have ratified them, and in large measure their practical effect has been confined to that continent.

Now, by virtue of the recent United Nations Conference on International Commercial Arbitration, there has been another major effort at international rule-making in this field. In pursuance of its stated purpose of producing an instrument responsive to the needs of present-day foreign trade arbitrations, the Conference drew up a new Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[2] Its sponsors hope that this Convention will receive wider acceptance than the Geneva Convention and Protocol. So far, however, thirteen countries have signed the Convention, and none has ratified it. The United States is not a signatory. How great a degree of acceptance the new United Nations Convention will receive still remains to be seen. Some of the problems affecting its acceptance may be visualized through a comparison of the UN Convention with the Geneva instruments and, where the United States is concerned, through an examination of the Convention in relation to the relevant provisions of American law.

1. 92 League of Nations Treaty Series 301, and 27 LNTS 157.
2. The text is printed in 13 Arb. J. 107 (1958).

I.

The pattern of the old and new instruments is much the same where arbitral agreements are concerned. The Geneva Protocol declares that clauses in contracts providing for the submission to arbitration of disputes shall be recognized and enforced in the territories of the contracting parties. Its provisions are so framed as to cover both agreements to arbitrate existing disputes and agreements to arbitrate future disputes. The new Convention contains provisions to the same general effect.

There are, however, marked differences between the two conventions in the matter of enforcement of arbitral awards. As a matter of substance they may be said to differ mainly in that the Geneva Convention provides for tighter controls over the enforcement process and for more rigid definitions of awards entitled to enforcement. As a matter of legal effect, which is more significant, they differ mainly in that in the UN Convention the burden of proving that an award is not entitled to enforcement has been shifted to the losing party in an arbitration.

As a practical matter the enforcement systems devised by each of these instruments is a relatively simple one. The Geneva Convention first establishes certain tests for the eligibility of awards. To obtain recognition and enforcement, awards must arise from arbitral agreements covered by the Geneva Protocol, they must be made in one of the contracting states, and they must concern disputes between nationals of contracting states.

The Geneva Convention then lays down positive tests which each award must meet in order to obtain recognition or enforcement. The award must arise from a valid arbitral agreement, it must deal with a legally arbitrable dispute, it must have been handed down by a properly constituted tribunal and in conformity with the local procedural law, it must be final in the country where it was made, and it must be compatible with the public policy of the country where enforcement is sought. Even if these tests are met, however, the court may refuse enforcement if it is satisfied that the award has been annulled or that it resulted from defective procedures.

The Geneva Convention fails explicitly to fix the burden of proof, often a crucial matter in contesting an award. Most of the enforcement tests, however, are of such a nature as to require an affirmative showing to the court, which as a practical matter would work to place the burden on the successful party. Thus enforcement

might be procedurally a difficult matter for him. Failure to meet any of the stipulated tests means failure to obtain enforcement; and even if all these requirements are met the losing party still may block enforcement by proving that the award is procedurally defective or has been annulled.

Many of the same tests have been written into the UN Convention. The way they are used and applied, however, has been so altered as to produce a markedly different result. In the first place, the specifications for awards entitled to enforcement have been relaxed. The Convention applies not only to awards handed down in the territories of a contracting state but also to awards "not considered as domestic" by a contracting state. This rather cryptic phrase extends the Convention to miscellaneous categories of awards failing to meet the territorial criterion but having some other connection with the national law. Significant changes are made also in the matter of reciprocity requirements. Personal reciprocity is dropped altogether, and territorial reciprocity no longer is mandatory.

In some respects the pattern of enforcement procedure delineated in the UN Convention is undoubtedly superior to that of the Geneva Convention. It bears the marks of better draftsmanship. It is clearer, more orderly, more logical. Perhaps because this is so, it also shows conspicuously the changes that have been made. First, the obligations placed on the successful party are now at a minimum. All he is required to do is to submit to the court copies of the award and of the underlying agreement to arbitrate. Unless the award is challenged successfully by the losing party or is thrown out by the court of its own motion, enforcement is virtually automatic. Second, the burden of proof now rests almost exclusively with the unsuccessful party. To block enforcement, he must make a positive showing that the award is defective on one of the grounds stipulated in the Convention. If these fail, he has no other recourse. If by chance he should fail to raise any of them, moreover, the court may not, under the terms of the Convention, look into them of its own motion. It is barred from raising any objections to an award except on grounds that it is contrary to public policy or involves a dispute that is not arbitrable under the local law.

It is true that in establishing this pattern of enforcement procedure the Conference refused to accept in full the concept promoted by the International Chamber of Commerce that the arbitral process should be divorced from national laws. None the less the provisions

of the Convention move in the direction of "autonomy of the will of the parties" and in some cases it is only by nuances in wording, as in Art. V(1 d and e) that contact with an identifiable national law is preserved. Even so, the effects of shifting the burden of proof to the losing party in such fashion and relieving the winning party of all material requirements are inescapable. A significant change has been effected in the conduct of international arbitration. To the extent that the new Convention is accepted by governments, the advantage in carrying on proceedings to enforce awards will pass from unsuccessful to successful party, from defendant to plaintiff. This result, it is said, will facilitate international trade. But, it also is said, this will be done only at the cost of hazarding the rights of the losing party and weakening the judicial controls needed to safeguard the integrity of the arbitral process.

II.

This is the issue that governments face when called upon to adhere to the UN Convention. Hence the success of the Conference which produced it in promoting arbitration progress will be gauged largely by the extent to which such governments are willing to accept the implications of the Convention. The best evidence of such acceptance, of course, would be early ratification by a sizable number of countries. But will the governments now studying the Convention and assessing its meaning in terms of their national law and practice submit it to their parliaments and, if so, how will it fare? Some doubts on this score are unavoidable. During the Conference the delegates of a number of countries warned of difficulties in ratification unless the Convention were adjusted to particular features of their national laws. In some cases the needed accommodations were not made. Moreover, a number of other delegates said frankly that their governments did not want to sign the Convention, much less ratify it, until they had time to go into it thoroughly.

The process of study, analysis and decision-making presumably is now under way in most of the countries represented at the Conference. It must be borne in mind that the Convention is a multilateral instrument dealing with subject matter intricately woven into the national legal system. In the circumstances it is reasonable to expect that the decision-making process will follow much the same pattern as decision-making for other multilateral conventions that intimately affect national law and jurisprudence. In such cases de-

cisions on ratification tend to turn upon the answers to certain practical questions: Does the convention conflict with national laws? Will it confer any real benefits?

However worthwhile a convention of this kind may be as a matter of policy, legal considerations are likely to be controlling. It has become axiomatic that countries normally avoid treaty commitments going measurably beyond their national laws. This can be seen clearly, for example, in the failure of successive efforts to write multilateral conventions on investment and establishment matters. In each case the failure can be attributed to the unwillingness of individual countries to alter, by treaty, policies towards aliens that had become an accepted part of the national legal fabric. Instead many of them insisted that the agreement be adjusted to the vagaries of their domestic legislation. The result was an agreement burdened with crippling reservations, or an agreement representing the lowest common denominator, or no agreement at all.

Commercial arbitration is vulnerable to much the same process, for it touches one of the most deeply cherished of all national concerns: the way in which justice is done. The reluctance of most countries to assume commitments going beyond the scope of their domestic arbitration laws was made abundantly clear at Geneva[3] and again at New York over thirty years later. The defects of the Geneva Convention have been attributed to the demands of individual countries for concessions to their domestic legislation. At New York, country after country sought to shape the draft convention to the peculiarities of its national laws and did not hesitate to warn of refusal to ratify the convention if the desired adjustments were not made. At one point, in fact, the pressure for such changes became so strong as to move the Turkish delegate to an eloquent but fruitless plea for the countries represented to desist and to seek instead to adjust their laws to the convention.[4]

3. The committee which prepared the initial draft of the Geneva Convention explained its limitations largely in terms of the need to take account of differences existing between various national legal systems and the necessity of providing against the tendency to reduce multilateral commitments to a point where the net result would be retrogressive as compared with the existing law of participating countries. League of Nations Economic Committee, Draft Protocol on the Execution of Foreign Arbitral Awards (Document A.11.1927.II) 1 (1927). Arthur Nussbaum, "Treaties on Commercial Arbitration," 56 Harv. L. Rev. 234, 239 (1942), has an interesting analysis of the weaknesses of the multilateral approach where commercial arbitration is concerned.
4. Statement of Professor Rabi Koral, during debate on reservations to the proposed convention, June 2, 1958, Document E/Conf. 26/SR15.

Next in order of importance is the practical matter of what advantages such a convention would confer. Unless there are clear advantages, of course, the chances that countries would accept it at the cost of serious conflict with domestic law are negligible. On the other hand, even if no such problems existed, acceptance would be most unlikely in the face of skepticism as to its actual worth. To allay such skepticism, difficult questions must be answered. Will the UN Convention, for example, assure enforcement of our awards by countries which now refuse to enforce them? Will it cover all kinds of awards or only a few selected categories? Will it afford our awards better and more expeditious procedures for enforcement? In some countries, especially in the underdeveloped areas, there may be some inclination to ask an even harder question. Will this Convention further our national interest or is it merely a device to strengthen the economic domination of weaker countries by stronger ones?

III.

When these practical tests are applied to the United States, it is seen that there are major legal problems at the outset, taking precedence over the serious questions of arbitration policy raised by the Convention. These problems concern the relationship of the Convention on the one hand to State arbitration statutes and on the other to the Federal Arbitration Act of 1925.

It is not proposed to go into the former at any length. The pattern of State arbitration laws is well-known. The majority of the States still maintain the traditional common law hostility to arbitration as tending to "oust the courts of jurisdiction". In these States agreements to arbitrate future disputes are declared, either by judicial decision or by statutes which in effect codify the common law rules, to be revocable and unenforceable. Only 17 States have enacted statutes of the modern type declaring such agreements to be irrevocable. Maintenance of the common law rule on future disputes in this manner raises directly and inescapably the question of conflict between Convention and State laws, for Article II of the UN Convention requires contracting parties to recognize all arbitral agreements, including future dispute agreements, as valid and to grant them enforcement.

As a consequence, Article II raises a major and perhaps insurmountable legal problem. The Convention, moreover, since it is framed in general terms, undoubtedly creates other obligations that

may be inconsistent with particular details of State law or judicial procedure.[5] How numerous and significant these conflicts may be can be determined only by thorough examination of the pertinent statutes and rules of court.

None the less, it has been suggested that a way can be found to avoid the State laws issue. The argument runs substantially as follows: The basic concern of the Convention is the more effective use of arbitration in international trade. This in turn comes within the jurisdiction of the Federal Government by virtue of its constitutional authority in the field of foreign commerce. In fact it was on the basis of Federal constitutional authority over foreign and interstate commerce and maritime jurisdiction that Congress enacted the Federal Arbitration Act.[6] In the circumstances, therefore, that Act affords a sufficient legal basis for United States acceptance of treaty commitments along the lines of those embodied in the Convention. The United States, in other words, could adhere to the convention on a limited basis by restricting its commitment to arbitrations cognizable under the Federal Act. Even though all arbitrations under State statutes would thereby be excluded, this manner of adherence would be sufficient for United States needs since it would cover the foreign trade arbitrations in which the United States is primarily interested.[7]

IV.

This line of reasoning, while interesting and suggestive, rests on a single assumption: that the Federal Arbitration Act of 1925 is sufficient domestic legal basis for adherence in the manner outlined. Is this assumption valid?

Neither the terms of the Act nor its interpretation by the courts is reassuring on this score. The plain wording of the statute gives evidence of major limitations in scope. Important categories of arbitrations are excluded from coverage. Jurisdictional restraints further limit its application. Its legislative history, moreover, affords no basis

5. Possible examples include the requirements in Article IV for filing documents pertaining to the award, and the provisions in Article V(1) restricting the court's power to inquire into certain grounds for denial of enforcement, permitting party choice of law as to some subject matter, and providing for severability.
6. House Report No. 96, 68th Congress, 1st session, 1 (1925); Senate Report No. 536, 68th Congress, 1st session, 2-3 (1925).
7. Hynning, "A Comparison of British and American Policies on International Commercial Arbitration," in Domke (ed.), International Trade Arbitration: A Road to World-Wide Cooperation 119-121, 125-126 (1958).

for overcoming these limitations. It is quite unrevealing, amounting to a few perfunctory committee reports and rather cursory debate in each House of Congress.

The construction of the Act by the courts by and large has resulted in defining closely its field of application or in creating unresolved issues of interpretation. The courts have had to struggle with a poorly drafted statute with many ambiguous features. As a consequence there have been conflicts between various Federal circuits on a variety of questions materially affecting the scope of the Act. Most of these conflicts are still unresolved. In fact it was only in 1956 that the Supreme Court finally disposed of perhaps the major one by holding in *Bernhardt v. Polygraphic Company of America*[8] that arbitrations not falling within the statutory definitions may not obtain benefit of the special enforcement procedures established by the Act.

In examining the Act's deficiencies as a domestic basis for accepting new treaty obligations, a useful starting point may be its definitions. The Act deals first with "maritime transactions", which are so defined as to omit such important matters, undeniably cognizable at admiralty, as towage, salvage and marine insurance.[9] This is done despite the fact that the Act rests in substantial part on the broad Federal powers over admiralty.

The Federal Arbitration Act applies to contracts "evidencing a transaction involving commerce" as well as to maritime transactions. The second important limitation written into the Act hence is to be found in its definition of commerce. As used in the Act, the term "commerce" means "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State and foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers

8. 350 U.S. 198 (1956).
9. 1 Benedict on Admiralty, sec. 100, 110a, 117 (6th ed. 1940). For criticism of these omissions, see particularly Poor, "Arbitration under the Federal Statute," 36 Yale L. J. 668, 672 (1937). The Act, of course, would be applicable if the dispute involving towage, salvage, or marine insurance also involved foreign commerce. Despite the admiralty nature of the subject matter, an arbitral clause in a maritime contract not coming within the Act presumably would be entitled to specific performance in States having modern arbitration statutes, in view of the Supreme Court's holding in Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 44 S. Ct. 274, 68 L. Ed. 582 (1924).

engaged in foreign or interstate commerce."

Apart from the exclusion of employment contracts, this definition is a comprehensive one. For the most part the courts have tended to apply it with liberality. They have found little difficulty in holding sales contracts within the Act whenever a reasonably demonstrable connection with interstate or foreign commerce could be shown.

In the case of construction contracts, however, the courts have taken a narrower view. For example, a contract for construction of an infirmary in Arkansas was held not to evidence a transaction involving interstate commerce, although the parties were an Oklahoma corporation and a Kentucky benevolent association authorized to carry on its activities in Arkansas.[10]

The limitation on the scope of the Act implied in the courts' attitude towards construction contracts is minor in effect, however, compared with the statutory exclusion of employment contracts. The latter provision obviously removes from the purview of the Act a major category of arbitrations. Nevertheless, the full extent of the limitation is not clear because of uncertainty as to what the term "contracts of employment" encompasses, especially whether it covers collective labor contracts, a subject beyond the purview of this article.[11]

Thus it will be seen that the limitations written into the Act by its definitions are a matter of major consequence. These definitions greatly reduce the body of arbitrations to which its advantages extend. Some classes of arbitrations are excluded altogether. Others must remain in doubtful status until conflicts among the lower Federal courts are resolved, and it would be imprudent to suppose that such conflicts invariably will be settled on the basis of the broader rather than the narrower construction. The limitations deriving from statutory definitions are so substantial in themselves that, taken alone, they are responsible for a narrow rather than a comprehensive statute. However, another body of limitations, of equal and perhaps greater impact, has been added to them. These derive mainly from the jurisdictional aspects of the Act.

The sum total of these limitations may be described in two brief propositions. First, the Act applies only to the arbitrations defined

10. W. R. Grimshaw Co. v. Nazareth Literary & Benevolent Institution, 113 F. Supp. 564 (1953).
11. See Burstein, The U.S. Arbitration Act—A Reevaluation, 3 Villanova L. Rev. 125 (1958), and notes on the *Lincoln Mills* case, 353 U.S. 448 (1957), listed in 13 Arb. J. 44, 214 (1958).

therein. Second, jurisdiction under the Act is not coextensive with normal Federal jurisdiction.

That the Act applies only to arbitrations falling within the ambit of its definitions was contested for many years. The source of this contest lies in the distinction which can be drawn between the definitions and other sections of the Act by reason of the way in which they are worded. The definitions are stated in narrow terms. Other provisions, however, and particularly Sections 3 and 4, are framed in a manner so broad as to create uncertainty about their relationship to the definitions. The language employed and the absence of cross references clearly bringing them within the limits of the definitions has suggested a possible intention on the part of Congress that the Act be construed section by section, each according to its plain terms, rather than as a unit.[12]

Section 3, providing for stay of action pending completion of arbitration proceedings, is the best example. This Section is framed in general terms. It authorizes stay of action in the case of "any suit or proceeding . . . brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration." It has seemed reasonable to many, in view of the breadth of this language, to regard Section 3 as extending to any arbitration over which a Federal court may properly assert jurisdiction.[13] Such an interpretation promised to open up the Act, or significant parts of it, to a material number of arbitrations not arising out of maritime transactions or foreign or interstate commerce. When the most obvious example, that of arbitrations at common law or under State statute carried into Federal court on diversity of citizenship grounds, is considered, the possibilities inherent in such an interpretation are manifest.

The question of the proper interpretation of Section 3 produced another conflict among the lower Federal courts. Much respectable judicial opinion was to be found on each side of the question. In a number of cases the courts found for the liberal view that Section 3 stood on its own footing, apart from and unaffected by the provisions seemingly restricting the Act to maritime transactions and "transactions involving commerce."[14] In doing so, they relied not only upon

12. See Kochery, "The Enforcement of Arbitration Agreements in the Federal Courts," 39 Cornell L. Q. 74 (1953); Sturges and Murphy, "Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act," 17 Law & Contemp. Prob. 580, 598-604 (1952).
13. Agostini Bros. Building Corp. v. U. S., 142 F. 2d 854 (1944).
14. Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 70 F. 2d

its wording but upon the fact that arbitration is commonly viewed in the United States as affecting the remedy rather than the substantive rights of the parties. In such case, since Congress has power to regulate the procedure of the lower Federal courts, it could bring arbitrations within the purview of the Federal Act even in cases where the substantive rights at issue were not controlled by Federal legislation. In cases taking the opposite view the courts tended to regard the limited purpose of the Act, as expressed in the provisions on commercial and maritime transactions, as controlling.[15]

The Supreme Court finally settled the matter in 1956, in the *Bernhardt* case (n. 8). This case, brought into Federal court on diversity grounds, involved an action for damages under an employment contract which had not been shown to involve interstate commerce. The defendant had moved for a stay of proceedings in order to submit the dispute to arbitration, as provided in the contract. The Supreme Court reversed an order granting the requested stay. It rejected the contention that Section 3 covers all arbitration agreements even though they do not involve maritime transactions or transactions involving commerce, pointing out, among other reasons, that Section 3 is an integral part of a whole, that the field in which Congress was legislating is carefully defined in the Act, and that consequently Section 3 must be regarded as a component of the entire regulatory scheme devised by the Act rather than as a virtually independent piece of legislation.

The Court further remarked that holding to the latter effect might raise a constitutional question in connection with diversity of citizenship cases by invading the local law field. Thus it was constrained to interpret Section 3 narrowly to avoid that issue.[16]

The result of the *Bernhardt* decision was to foreclose the most promising possibility in the Act: that it is coextensive with normal Federal jurisdiction in the matter of stay of action pending arbitration. As a practical matter this holding rounds out a sizable body of jurisdictional limitations whittling away the number of arbitrations cognizable under the Act. First, it early was established that Federal courts may not assume jurisdiction over an arbitration merely because

297 (1934), aff'd 293 U.S. 449 (1935); Agostini case, *supra*, n. 13; Tenney Engineering, Inc. v. United Electrical R. & M. Workers, 207 F. 2d 450 (1953), note in 40 Virginia L. Rev. 209 (1953).

15. Zip Mfg. Co. v. Pep Mfg. Co., 44 F. 2d 184 (1930).

16. While the Court held that the Federal Arbitration Act did not apply, it retained jurisdiction over the case by virtue of diversity of citizenship, applying, however, State rather than Federal law.

the parties agree upon submission to it. An arbitral clause stipulating that arbitration should be held pursuant to the Act and judgment on the award entered in district court does not suffice where the statutory requisites of a transaction in foreign or interstate commerce or diversity of citizenship are missing.[17] This is the case even though the controversy made subject to the Act by the arbitral clause is a justiciable Federal dispute, such as one involving patents.[18]

Second, subject matter incontestably within the jurisdiction of the Federal courts none the less is beyond the scope of the Act unless a connection with foreign or interstate commerce or with a maritime transaction is established. This is the clear import of judicial holdings in cases involving arbitration of patent controversies. In fact, applicability of the Act to patent disputes even may be subject to further limitation because of differing judicial views of what is needed for a patent contract to "evidence a transaction involving commerce."[19]

Third, a major limitation derives from the matter of diversity of citizenship. Three questions are involved. Is diversity of citizenship sufficient by itself to bring an arbitration within the Act? Is interstate commerce alone sufficient? Or are both diversity of citizenship and interstate commerce required? After much argument during the early years of the Act the belief developed that any dispute involving interstate commerce would fall within the terms of the Act.[20] In 1933, however, the Circuit Court of Appeals held in *Krauss Brothers Lumber Co. v. Bossert and Sons, Inc.*[21] that there must be both diversity and interstate commerce. This case concerned an appeal from an order compelling arbitration under Section 4 of the Federal Arbitration Act in a dispute developing out of a contract between a New York corporation and a Washington corporation for the purchase and sale of lumber. The issue of jurisdiction being raised by the appellant, the Circuit Court held that the court below had jurisdiction over the dispute, noting that the statute does not rest the court's power to compel arbitration on the fact that the contract "involved commerce" but instead on the test that the court be one which, in

17. In re Woerner, 31 F. 2d 283 (1929).
18. Zip Mfg. Co., supra, n. 15.
19. Contrast In re American Locomotive Co., 87 F. Supp. 754 (1949), with Zip Mfg. Co., *supra*, n. 15, and In re Cold Metal Process Co., 9 F. Supp. 992 (1935).
20. On this and related questions of jurisdiction, see Phillips, "Arbitration and Conflicts of Laws: A Study of Benevolent Compulsion," 19 Cornell L. Q. 211 (1934).
21. 62 F. 2d 1004 (1933).

the absence of an arbitral agreement, would have jurisdiction of the subject matter. The court further explained the jurisdictional implications of the Act in these terms (at p. 1006):

> "The remedy is not even coextensive with the jurisdiction; for instance, the controversy may arise between citizens of different states and the contract not 'involve commerce'. A citizen of New Jersey may enforce arbitration against a citizen of New York upon a contract which requires him to ship the goods from Newark to Manhattan, but not upon one where they are to go from Manhattan to the Bronx. Conversely, a citizen of New York may not come to the District Court to enforce arbitration against another citizen of that State, though the goods must be shipped across a state line."

The decision in the *Krauss Brothers* case has been followed consistently.[22] For all practical purposes it may be deemed to have disposed of the issue. Its plain effect is another major limitation on the scope of the Act. To come within the Act, an arbitration first must come within the statutory definitions. Then it must meet the requirements for Federal jurisdiction. There must be diversity of citizenship, and the controversy must have at issue a sum of $10,000 or more, as in suits at law, the required minimum having recently been increased to this figure from $3,000.[23]

This section seems bound to reduce substantially the volume of arbitrations cognizable under the Act. Arbitrations involving less than the former minimum sum are not uncommon, and in consequence a considerable number of arbitrations involving foreign or interstate commerce have had to be held under the common law rules or under State statutes even though their subject matter otherwise would bring them within the Federal Act. Perhaps the majority of arbitrable disputes in foreign and interstate commerce involve somewhat less than the new statutory minimum of $10,000. Thus the latter seems unavoidably to entail a further and deeper cut in the number of arbitrations coming within the terms of the Act. Moreover, these limitations on diversity of citizenship are of particular importance from the standpoint of foreign trade arbitrations, for the same principles apply to controversies involving nationals of a foreign country as to

22. Cold Metal Process Co., *supra*, n. 19; San Carlo Opera Co. v. Conley, 72 F. Supp. 825 (1946), aff'd 163 F. 2d 310; Grimshaw case, *supra*, n. 10.

23. Public Law 85-554, 85th Congress, of July 25, 1958, 72 Stat. 415, provided for this increase, the first change in the required amount in controversy since 1911.

controversies involving citizens of different States. It is conceivable that they would necessitate referral to State statutes and courts of a considerable body of arbitrations that relate exclusively to foreign commerce.

Fourth, another limitation on the scope of the Federal Arbitration Act arises in connection with the unsettled question of whether the Act extends to arbitrations in a foreign jurisdiction. Here again the lower Federal courts are in disagreement, and the Supreme Court has yet to pass upon the question. In *The Silverbrook*[24] the court held that the Act contemplates only such arbitral agreements as could be carried out in the United States within the jurisdiction and under the control of the Federal courts. Hence, the court refused to grant enforcement to an arbitral clause in a charter party which provided for arbitration under the English statute. In its opinion the court relied strongly upon the provisions of Section 4 of the Act which require the arbitration to proceed within the district in which the petition for an order directing such arbitration is filed.[25]

On the other hand, perhaps the greater weight of judicial opinion favors the opposite conclusion. In *Danielsen v. Entre Rios Railroad Co.*[26] the court relied mainly on the broad language of Section 3 for authority to enforce a charter party provision requiring arbitration in London. In doing so, it observed that the Act evidenced an intent on the part of Congress to give effect to contracts for arbitration in foreign as well as in interstate commerce and that the incidents of such commerce, which included arbitration, might occur in foreign places. Other Federal courts have tended by and large to follow the rule of the *Danielsen* case, both when the issue involved arbitration abroad and when it merely involved arbitration within the United States but outside the jurisdiction of the court.[27] Although the scale seems to be tipped in favor of this rule, to the extent that it rests on the broad wording of Section 3, its continued validity would seem to be uncertain in view of the Supreme Court's ruling on the scope of that Section in the *Bernhardt* case.

24. 18 F. 2d 144 (1927).
25. In The Beechwood, 35 F. 2d 41 (1929), another Federal District Court reached a similar result, also in connection with a charter party stipulating that arbitration be under the English statute.
26. 22 F. 2d 326 (1927).
27. The Fredensbro, 18 F. 2d 983 (1927); Uniao De Transportadores Para Importacao E Commercio, Ltda. v. Companhia De Navegacao Carregadores Acoreanos, 84 F. Supp. 582 (1949); International Refugee Organization v. Republic Steamship Corp., 93 F. Supp. 798 (1950); Fox v. The Giuseppe Mazzini, 110 F. Supp. 212 (1953).

V.

When the cumulative effect of the limitations inhering in the Federal Arbitration Act is considered, it is difficult to avoid the conclusion that the Act is insufficient as a domestic legal basis for even limited adherence to the UN Convention. The new treaty obligations would be comprehensive in terms of the arbitrations to which they apply. On the other hand, the existing Act covers only a part of those arbitrations, leaving a substantial gap between treaty and statute. Furthermore, not all deficiencies of the Act are self-evident. That some categories of arbitrations are excluded is certain from even a hasty reading of the statute. That others are excluded is another matter entirely. Their status is beclouded by the ambiguities of the statute and by conflicting lines of judicial construction. Even so, the Act remains after thirty years the sole expression of Congressional policy in this field.

The outlines of the process of narrowing the scope and effectiveness of the Act are clear enough. First, under the United States federal system only a portion of the sum total of arbitrations held in this country every year come within Federal jurisdiction. Perhaps the bulk of American arbitrations are a matter of State concern, governed by State statutes or by common law rules applied in the main by State courts. Second, the statutory definitions, by their narrow dimensions, exclude others over which the Federal Government properly could assert jurisdiction. Third, the even narrower jurisdictional requirements of the Act perform a double work of exclusion. On the one hand they shut out some arbitrations under State law which ordinarily would be brought into Federal court on simple diversity of citizenship grounds. On the other hand, they block additional arbitrations, for want of diversity grounds, even though the subject matter involved lies within the legislative competence of the Federal Government. The residue is virtually a hodge-podge of arbitrations having no real common denominator. It may fairly be said to consist of some but not all maritime transactions; some but not all transactions involving commerce; some but not all diversity of citizenship cases.

Moreover, the principles of selection are by no means clear in every case. The reason for exclusion of employment contracts seems evident enough. Labor arbitrations were a matter of controversy when the Act was adopted, and their inclusion would not further the main purpose of the Act, which was to help the trading com-

munity.[28] The same is not true, however, of the limitations stemming from the definition of maritime transactions. There appears to be no good reason, historical or otherwise, for including some such transactions and omitting others. This is equally so in the case of the diversity of citizenship requirement. There appears to be no good reason why this rule should be so framed as to exclude the kind of arbitrations in foreign or interstate commerce which it was the obvious intent of the Act to cover. If such a reason exists, it can not be ascertained with any certainty from the legislative history, which is quite unrevealing on this point.[29]

Narrow as the confines of the Act may be, and inexplicable as some of its limitations may seem, it is arguable that the Act still is broad enough to cover most foreign trade arbitrations, which are what the United States is interested in from the standpoint of adhering to the UN Convention. It is true that the Act is applicable to many such arbitrations. It does not apply, however, to all varieties of such arbitrations, as the UN Convention is intended to do. Almost every one of the limitations inherent in the Act could operate against arbitrations in foreign trade. Maritime transactions and employment contracts can and often do involve foreign trade. Uncertainties over whether the Act applies to agreements to arbitrate in a foreign jurisdiction obviously are most relevant to foreign trade contracts. Even the diversity of citizenship rule could work to exclude some such arbitrations, and it may be noted that the Convention does not establish a comparable rule. Above all perhaps is the consideration that the grounds on which the limitations of the Act shut out some foreign trade arbitrations and fail to affect others are often complicated and technical, leaving the over-all status of such arbitrations under the Act hardly satisfactory as an underpinning for international obligations in that field.

To describe the deficiencies of the Federal Arbitration Act is virtually to suggest the remedy. If the Act is insufficient as a domestic legal basis for even limited adherence to the Convention, it need not remain so. Its shortcomings in this respect could be removed by

28. *Supra*, n. 6. It is clear from testimony at the hearings that support for the measure came preponderantly from commercial groups, many of which, moreover, were concerned with facilitating interstate rather than foreign commerce.

29. Early versions of the Act provided for diversity of citizenship but waived the $3,000 limitation on the amount in controversy. The latter was restored at the request of Senator Walsh who was opposed to broadening the jurisdiction of the Federal courts. 49 American Bar Assn. Reports 284 (1924).

suitable amendment. Amendments bringing the Act more nearly in harmony with the requirements of the Convention where arbitrations under Federal jurisdiction are concerned are constitutionally feasible in view of the broad authority of Congress over interstate and foreign commerce and over admiralty matters, as yet incompletely exercised in the field of arbitration.

None the less to amend the Act to make it adequate for purposes of the Convention would involve significant changes. Such amendments would alter materially the established scope of the Act. They would measurably broaden limits of the Act fixed over thirty years ago and confirmed by numerous judicial decisions. Their net effect would be a legislative measure rather different in orientation from that devised in 1925. A broadening of the Act in this fashion further would upset the balance established between Federal and State governments in the exercise of jurisdiction in this field. The existing authority of the States would be narrowed considerably in an area of overlapping or concurrent jurisdiction where the balance has always been predominantly in their favor. In addition, amendments to make the Act adequate in terms of the Convention would necessitate a change, in the form of an exception for arbitration cases, in the monetary requirements for diversity jurisdiction. These are substantial changes with implications in other fields than arbitration. As such, they are hardly to be undertaken lightly, and a necessary prelude would seem to be a thorough examination of possible effects of an amended Act. Inevitably this would involve considerations of policy as well as of law.

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AN EDITORIAL

(*Continued from Page* 178)

cite so many arbitration cases in hearings and in briefs that arbitrators are obliged to spend a considerable amount of time checking and evaluating such cases in the light of the evidence and documents presented to them. Parties frequently forget that the greatest cost of arbitration is in preparing a case properly and in paying for time lost in meetings and hearings. This applies both to unions and companies. At a time when all are cost-conscious a second look ought to be taken to see if these cases should really be processed to the final stage. This applies particularly where it is a practice to 'pass the buck' to the arbitrator in face-saving or political arbitrations."

"Arbitration Restricted to the 'Expert'. Another criticism may be directed at the very small number who participate in arbitration as if they were invoking the services of an 'impartial Univac.' After careful examination of the fundamental ingredients—namely, the contract, the aggrieved, the shop committeeman, the foreman and the plant supervisor—the expert withdraws into his carefully guarded laboratory (protected by screening boards and highly technical, almost incomprehensible phrases) and all this knowledge is transformed into punched cards and fed into the 'monster thinker'. Lightning flashes, electrodes spark, and the purely scientific arbitrator delivers his award. The award is readable only by the experts, and the case at issue has been resolved for this new class of scientist. In the meantime, of course, arbitration has been removed from the common man, and the poor grievant and the supervisor whose decision has been questioned find out third-hand, many months later, that their problem involving the right of a foreman to transfer a man for two hours under certain conditions has been resolved in such and such a way. This may be exaggerated, but the tendency to remove arbitration from those who actually have the disputes is occasionally noticeable, and is to be regretted. It seems most likely that a reaction to this 'ivory tower' approach will set in so that the process may continue to be known and understood by those immediately involved. The fact that vast training programs, by both management and labor, are bringing knowledge of arbitration to wider groups supports this hope."

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *Arbitration Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

UNDISPUTED TESTIMONY THAT BOTH PARTIES AGREED TO REFER EXCAVATION DISPUTE TO "IMPARTIAL ARBITRATOR" HELD SUFFICIENT TO ESTABLISH AN AGREEMENT TO ARBITRATE. The court said: "The plaintiff . . . testified that after the dispute had developed (defendant) suggested using Matz as an 'impartial arbitrator,' that (defendant) contacted Matz, that (plaintiff) agreed and that 'in order to arbitrate this I agreed to split the bill.' All of this testimony came in without objection, and none of it was contradicted by (defendant) when he testified, either when called by the plaintiff or when produced on behalf of the defendants. We think that this uncontradicted evidence is sufficient to show that the computation of the amount of excavation was submitted by the parties to Matz for his determination as arbitrator and that they intended and agreed that his findings should be binding." *Parr Construction Co. v. Pomer,* 144 A. 2d 69 (Maryland Court of Appeals, Brune, Ch. J.).

SUBCONTRACTOR BOUND TO TERMS OF GENERAL CONTRACT BY HIS AGREEMENT WITH CONTRACTOR HELD TO HAVE AGREED TO ARBITRATE DESPITE ABSENCE OF ARBITRATION CLAUSE IN SUBCONTRACT. The court said: "When that paragraph bound the sub-contractor to the terms of the General Conditions and other General Contract documents *insofar as applicable to the work of the Subcontractor* and went further and gave the contractors 'the same power with respect to this Subcontract that the Owner may exercise over the Contractor,' it clearly imported into the subcontract, as one of the items of 'power,' the right of arbitration." *Kalin Contracting Co. v. Picram Construction Corp.,* 178 N.Y.S. 2d 294 (Shapiro, J.).

PROVISION THAT CONTRACT BE GOVERNED BY MASSACHUSETTS LAW NOT INCONSISTENT WITH ARBITRATION CLAUSE IN PURCHASE ORDER. A confirmation of a purchase order which did

not contain an arbitration clause, referred to the law of Massachusetts to "govern its validity, interpretation and performance." In denying a stay of arbitration instituted under the arbitration clause of the purchase order, the court said: "Petitioners contend that the provision in each 'confirmation', that the contract is to be deemed a Massachusetts contract and governed by Massachusetts law as to validity, interpretation and performance, is inconsistent with the arbitration provision contained in each of respondent's purchase orders. There is no claim, however, that the provision for arbitration is unenforcible under Massachusetts law (cf. *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284), and it would seem that an arbitration clause may validly provide that the arbitrators make their award in accordance with the law of a specified jurisdiction. There is, in short, no showing of any conflict or inconsistency between the arbitration clause and the provision for application of the law of Massachusetts." *Wachusett Spinning Mills v. Blue Bird Silk Mfg. Co.*, 12 Misc. 2d 822, 177 N.Y.S. 2d 938 (Fine, J.).

ACKNOWLEDGMENT OF AND DELIVERY INSTRUCTIONS ON PURCHASE ORDERS CONTAINING ARBITRATION CLAUSE HELD TO BE VALID CONTRACT TO ARBITRATE DESPITE FACT THAT SUBSEQUENT "CONFIRMATION OF ACCEPTED ORDER" DID NOT CONTAIN ARBITRATION CLAUSE. In acknowledging the purchase orders, the manufacturer also noted when delivery of their yarn goods would be made. An arbitration was sought to be stayed on the contention that the purchase orders were merely an offer, that the acknowledgment was but evidence of receipt of the orders, and the confirmation with its new terms was in the nature of a counter-offer. In rejecting this contention the court found that the acknowledgment included delivery terms and therefore was not a mere receipt. Said the court: "The only reasonable construction of the statement in each of the signed 'acknowledgments' that 'delivery will be made' is that the order was accepted and that the party signing the 'acknowledgment' form agreed to perform and make delivery in accordance therewith. Thus, although the 'acknowledgments' did not use the word 'accepted', the express undertaking to make delivery in accordance with the orders constituted . . . a legal acceptance and gave rise to a binding contract between the parties." *Wachusett Spinning Mills v. Blue Bird Silk Mfg. Co.*, 12 Misc. 2d 822, 177 N.Y.S. 2d 938 (Fine, J.).

WIDOW CANNOT ENFORCE ARBITRATION WHEN CONTRACT CLAUSE SPECIFICALLY APPLIES ONLY TO DISPUTES "BETWEEN THE PARTIES OR THEIR REPRESENTATIVES." The widow was not a party to the partnership agreement, nor was she the legal representative of her deceased husband. Said the court: "The omission of the word 'widow' from the arbitration clause, notwithstanding the repeated use of that word in the provisions conferring substantive rights upon the 'widow' of each deceased partner, must be deemed to indicate that the rights of a 'widow' were to be enforced in courts of law and not by arbitration." *Laiken v. Laiken*, 178 N.Y.S. 2d 871 (Streit, J.).

II. THE ARBITRABLE ISSUE

DISPUTE BETWEEN CONTRACTOR AND SUBCONTRACTOR OVER ALLEGED CONVERSION OF BUILDING MATERIALS HELD ARBITRABLE UNDER BROAD ARBITRATION CLAUSE. The subcontractor contended that a broad clause contemplated only disputes involving commercial dealings between the parties and not torts. In rejecting this contention and granting a stay of court action pending arbitration, the court said: "Since the . . . cause of action involves title to property inextricably tied up with the contract, . . . that dispute . . . is referable to arbitration under the broad language of the arbitration clause, providing, as it does, that *any* controversy or claim arising out of or relating to the contract or the breach thereof shall be settled by arbitration." *Kreisler-Borg Construction Co. v. Borg,* 12 Misc. 2d 306, 178 N.Y.S. 2d 366 (Shapiro, J.).

DISPUTE OVER VACATION PAY FOR EMPLOYEES LAID OFF FOR LACK OF WORK HELD ARBITRABLE despite fact that vacation provisions of contract did not refer to lay-off circumstances. The first Circuit Court of Appeals upheld the District Court's decision (digested in *Arb. J.* 1958, p. 164, 170) which reviewed the question of arbitrability under declaratory judgment proceedings. The District Court had held that "issues do not lose their quality of arbitrability because they can be correctly decided only one way." In expanding on this point the Court of Appeals said: "In this respect we think that the jurisdiction of the arbitrator, whose judgment is invoked in the collective bargaining agreement instead of that of the court, is similar to a court's jurisdiction. If the subject matter of a claim is within the court's jurisdiction, the court does not lose its jurisdiction because of the fact that the proper disposition of the claim may be crystal-clear under the law. Indeed, if in the present case the grievance in question is confided to an arbitrator by the collective bargaining agreement, the court in a Sec. 301 proceeding has no business to concern itself with a preliminary question whether the answer to the grievance in question on its merits may or may not be entirely clear under the language of the agreement. . . . Of course, we do not mean by the foregoing to intimate how we think the grievance should be decided on its merits." *New Bedford Defense Products Div. of Firestone Tire & Rubber Co. v. Local 1113 of Int'l Union, United Automobile Workers (UAW-CIO),* 258 F. 2d 522 (C.A. 1st, Magruder, Ch. J.).

WHETHER RESPONDENT WHO IS NO LONGER AN EMPLOYER IS ENTITLED TO RETURN OF $500 DEPOSIT UNDER CONTRACT WITH UNION HELD QUESTION FOR THE ARBITRATOR. Said the App. Div., in reversing an order of the Municipal Court: "That will depend on how the agreement is interpreted. In view of the broad arbitration clause, that question, together with any incidental questions arising after the making of the contract, must be decided by the arbitrators." *Greenberg v. Pitson,* 178 N.Y.S. 2d 263 (1st Dept.).

WHETHER NEW CONTRACT CLAUSE ELIMINATED RESTRICTION ON CONTRACTING OUT OF REPAIR OPERATIONS HELD ARBITRABLE UNDER BROAD ARBITRATION CLAUSE. The original contract, whose classification section included such repairs, contained a clause providing that the company shall repair and maintain its buses with its own employees "in the same general manner as in the case of street cars." The new contract provided that the "provisions of the present agreement regarding the continuation of conditions as they existed under street car operation shall be eliminated." At this time the company only operated buses. The court discussed the history of the new clause and determined that whether the new clause affected the provision of the prior contract or was limited only to other sections was arguable and as such presented an arbitral issue as to whether the language in the prior contract was still in force. The employer was therefore directed to submit to the arbitration. *Local Division 1509, Amal. Assoc. of Street, Electric Railway and Motor Coach Employees v. Eastern Massachusetts Street Railway Co.*, 162 F. Supp. 942 (D.C. Mass., Aldrich, D. J.).

DISCHARGE BASED UPON REFUSAL OF EMPLOYEES TO ANSWER INQUIRIES OF CONGRESSIONAL COMMITTEE CONCERNING ALLEGED COMMUNIST AFFILIATIONS HELD TO BE FOR CAUSE AND NOT ARBITRABLE. The employees invoked the First and Fifth Amendments. Holding this to be just cause *"as a matter of law"*, the court felt constrained to follow the reasoning of the *Black v. Cutter Laboratories* decision, 351 U.S. 292 (digested in *Arb. J.* 1956, p. 112), "in holding that the public policy of that state [California] forbade the enforcement of an arbitration award which directs the reinstatement to employment of a member of the Communist Party. The courts of New York are no less aware of the Communist menace to democracy. The three employees were perhaps within their constitutional rights in refusing to answer the questions put to them and even to their warped political beliefs but they have no constitutional right to employment." *Carey v. Westinghouse Electric Corp.* 178 N.Y.S. 2d 846 (Spector, J.).

SENIORITY IN LAYOFF DISPUTE HELD NOT ARBITRABLE WHERE LOCAL UNION FAILED TO NEGOTIATE LAYOFF PROCEDURES DESPITE ARBITRATION CLAUSE REFERRING TO INTERPRETATION AND APPLICATION OF THE COLLECTIVE BARGAINING AGREEMENT. The contract was between company and international union, leaving it to the local to negotiate layoff and rehiring procedures. No such procedures having been negotiated, the court said: "There is no language unsupplemented by any local agreement determining specified layoff and rehiring procedures . . . which an arbitrator could interpret so as to determine that any right of [the employee] under the agreement had been violated." The court refused to direct the employer to arbitrate. *Local 201, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. General Electric Co.*, 163 F. Supp. 741 (D.C. Mass., Francis, J.).

GRIEVANCE BASED ON COMPANY FURLOUGH POLICY CLAIMED BY UNION TO BE A VIOLATION OF NATIONAL CONTRACT WAGE PAYMENT PROVISIONS HELD TO BE ARBITRABLE. Said the court: "Since these grievances involve the *interpretation* of the agreement they are clearly within the [national contract]. It is not this court's function to adjudicate the grievances but only to determine whether or not they are arbitrable under the terms of the agreement, and they clearly are. The meaning of the provisions sought to be arbitrated are not so clear and beyond dispute that we can say there is nothing to be arbitrated especially since the agreement provides . . . that furloughing shall be 'in accordance with local procedure'." *Carey v. Westinghouse Electric Corp.*, 178 N.Y.S. 2d 846 (Spector, J.).

GRIEVANCE REQUESTING PROMOTION FOR EMPLOYEE WORKING IN A HIGHER CLASSIFICATION HELD TO INVOLVE MERIT INCREASE AND THEREFORE NOT ARBITRABLE UNDER COLLECTIVE BARGAINING AGREEMENT. The court said that, in its opinion, "the 'promotion' sought . . . clearly constitutes a 'merit increase' within the meaning and contemplation of the agreement and the grievance is, therefore, not arbitrable. The procedures and policies relating to 'merit increases', which are expressly made applicable by the agreement, include a *'change to a higher classification to reflect a corresponding change in duties and responsibilities.'* This language is exactly applicable to (the) request for a higher classification because of the duties and responsibilities of the work being performed." *Hall v. Sperry Gyroscope Co.*, 178 N.Y.S. 2d 929 (Streit, J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

CLAIMANT MAY ENFORCE APPRAISAL AGREEMENT IN INSURANCE CONTRACT SINCE N.Y. ARBITRATION STATUTE IS INAPPLICABLE TO SUCH CONTRACTS. The company contended that Art. 84 was the exclusive source of remedies. In the court's view those principles apply that were enunciated by the Court of Appeals in *Delmar Box Corp. v. Aetna Ins. Co.*, 309 N.Y. 60, 127 N.E. 2d 808 (digested in *Arb. J.* 1955, p. 164), where "it was held that similar provisions for appraisal do not constitute an agreement for arbitration and are not specifically enforceable under Article 84 which applies to contracts for arbitration." *Karasch v. Empire Mutual Insurance Co.*, 175 N.Y.S. 2d 690 (Brennan, J.).

MUNICIPAL COURT MAY ONLY STAY AN ACTION, NOT DISMISS A COMPLAINT, UNDER SEC. 1451 C.P.A., PENDING DETERMINATION OF VALIDITY OF ARBITRATION AGREEMENT. Appellate Term ordered hearing on contract to be concurrent with trial of action as to whether the issue is referable to arbitration, so that all questions might be determined simultaneously. *Beautiful Lady, Inc. v. Edward Gottesman, Inc.*, 13 Misc. 2d 438.

UNION HELD TO HAVE STANDING TO ENFORCE ARBITRATION UNDER SECTION 301(a) OF TAFT-HARTLEY LAW DESPITE FACT SIGNERS OF THAT AGREEMENT WERE INDIVIDUAL MEMBERS RATHER THAN THE UNION. Although the union had participated in negotiations and dues had been checked off for the union, the employer asserted that the union could not demand arbitration because it was not the signer of the contract. The court said: "The language of the contract, phrased in terms of each individual employee as a party, apparently was intended by the company to bring the contract within the *Westinghouse* doctrine [348 U.S. 437]. But language and legal strategem must give way to reality. Artful phrasing cannot change a labor organization into something other than it is under the Act, nor preclude this plaintiff from seeking enforcement of its bargaining agreement in this Court under Section 301. The employee group which signed the contract was a labor organization within the meaning of the Act, and the right to arbitration which it is now seeking to enforce is an obligation running to the union and not a personal right as was sought to be enforced in *Westinghouse*." *Independent Circulation Union v. Item Co.*, 163 F. Supp. 399 (E. D. La., Wright, D. J.).

ARBITRATION HELD TO BE PROPER FORUM FOR GRIEVANCES ARISING OUT OF FURLOUGH POLICY DESPITE CONTENTION THAT NLRB HAS EXCLUSIVE JURISDICTION. The court said. "There is no constitutional or statutory prohibition which would prevent the parties from contracting to settle their grievances by arbitration rather than by resort to any machinery set up by the Federal Government." *Carey v. Westinghouse Electric Corp.*, 178 N.Y.S. 2d 846 (Spector, J.).

UNION'S FAILURE TO OBSERVE TIME LIMITS AND TO USE PRECISE CONTRACT FORM IN FILING OF GRIEVANCE HELD NO BAR TO ARBITRATION WHERE EMPLOYER HAD, IN TWENTY-ONE PREVIOUS GRIEVANCES, PERMITTED SIMILAR LAPSES. Said the court: "The defendant was at no time misled as to the nature of the grievance. . . . To hold that there was not substantial compliance with the procedural requirements . . . would be to disregard substance and fair dealing in favor of full compliance of all the technical requirements." *Int'l Union of Operating Engineers (AFL-CIO), Local No. 381 v. Monsanto Chemical Co.*, 164 F. Supp. 406 (W.D. Arkansas, Miller, D. J.).

WHETHER UNION'S DELAY IN ARBITRATING UNTIL AWARD IN SIMILAR CASE WAS RENDERED WAS UNREASONABLE HELD TO BE A QUESTION FOR THE COURT. While admitting that the grievance itself was arbitrable, the employer claimed that by delay the union had waived its right to arbitrate. The District Court (161 F. Supp. 222, Mass.) held that absent a specific contract provision, a reasonable time is presumed, and that "the possibility that (the other) case might produce a decision that everyone would accept as a precedent might strike some reasonable men as being just ground for delaying the (instant arbitration)—an arbitration

which would consume time and money." The court further held that the question of arbitrability in this case was one which ought to be left for the arbitrator. However, the First Circuit Court of Appeals reversed this decision which did not "sufficiently adhere to the teaching of *Local 149 v. General Electric*" (digested in *Arb. J.* 1958, p. 48), where the court held that on a motion to compel arbitration the court "has an inescapable obligation to determine as a preliminary matter whether the defendant did contract to refer the issue to arbitration." Holding that the contract provided for the arbitration of grievances but not the issue of arbitrability, the court said: "Hence, whether the Employer has agreed to submit this matter to arbitration depends upon a determination by the court, as a preliminary matter, whether all the conditions precedent to arbitration have been fulfilled, including a determination whether the union acted 'within a reasonable time' in pressing for arbitration." *Boston Mutual Life Insurance Co. v. Insurance Agents' International Union (AFL-CIO)*, 258 F. 2d 516 (C.A. 1st, Magruder, Ch. J.).

INDIVIDUAL EMPLOYEE CANNOT COMPEL ARBITRATION WHEN UNION AND COMPANY AGREE ON SETTLEMENT DURING GRIEVANCE PROCEDURE DISCUSSIONS. The union's grievance committee approved the company's position with respect to a grievance arising out of an employee's failure to give timely notice of his desire to return to work following a leave of absence. The employee refused to accept the settlement and demanded arbitration. In holding that the employee had no cause of action to compel arbitration, the court said: "As the grievance has been determined and settled as between the employer and the union by the completion of (Step No. 3), neither the union nor the employer has a right to arbitration under (Step No. 4). There is now no dispute between the union and the employer and in such circumstance, there is no provision for arbitration of the direct employer-employee dispute. The petition must be dismissed as there is nothing to arbitrate." *Calka v. Tobin Packing Co.*, 12 Misc. 2d 455, 176 N.Y.S. 2d 910 (Hamm, J.). ?

IV. THE ARBITRATOR

DETERMINATION OF AMOUNT IN DISPUTE, WHICH ACCORDING TO CONTRACT WAS TO BE "PLACED IN ESCROW IN NEW YORK SUBJECT TO THE DECISION OF THE ARBITRATORS" HELD TO BE ISSUE FOR THE ARBITRATORS. Under a tripartite arbitration clause the owner of a vessel who claimed damages against the charterer, demanded that the charterer deposit in escrow an amount equal to the claim pending the decision of the arbitrators. Each of the parties sought a court order to proceed with arbitration, but the charterer insisted that the amount of the escrow deposit should be first determined by the arbitrators. In upholding this position the court found authority in Sec. 4 of the Federal Arbitration Act, whereby the court may order arbitration "in the manner provided for in such agreement." Said the court: "The words 'in the manner provided for in such agreement' refer only to procedure and do not relate to the substantive rights of the parties. It is inconceivable that the parties intended that

either could by the mere unilateral assertion of a claim require the other to deposit such sum in escrow as the claimant should demand." *Petition of Conquistador Cia. Naviera S.A.*, 165 F. Supp. 38 (S.D. N.Y., Sugarman, D. J.).

COURT REMITS MISCALCULATED AND EXCESSIVE AWARD TO SAME ARBITRATOR FOR REHEARING. In reversing, the App. Div. (4th Dept.), said: "The record discloses that there was an evident confusion and miscalculation of figures in the arbitrator's award, that he exceeded his powers in that he made awards to the owners against the contractor upon matters not submitted to him." Remanding, the court said, "will give the arbitrator an opportunity to clarify his intentions." *Lublin Construction Co. v. Fried*, 9 App. Div. 988, 176 N.Y.S. 2d 25 (Per Curiam).

FAILURE OF PARTY TO APPOINT AN ARBITRATOR WITHIN CONTRACTUAL TIME LIMIT HELD TO BE WAIVER OF RIGHT TO MAKE APPOINTMENT. AWARD RENDERED BY OTHER PARTY-APPOINTED ARBITRATOR CONFIRMED AS PURSUANT TO CONTRACT TERMS. The arbitration clause provided that in the event of failure to appoint, "if there be one arbitrator his decision shall be binding." The court found that though the appellant did not notify the respondent of any appointment, he nevertheless did participate in some of the hearings on the merits. The court said that "under such circumstances, it appears that appellant acquiesced in submitting the arbitration matter to one arbitrator." *Eckert v. Davis*, 161 A.C.A. 690, 327 P. 2d 44 (Cal. App. 2d Dist., Parker Wood, J.).

ARBITRATOR'S TESTIMONY MAY BE HEARD TO IMPEACH AN AWARD PROVIDED HE HAS NOT YET SIGNED IT, the court holding that when such testimony is admitted the position of other arbitrators in that case would also be heard. In this ruling the court reaffirmed the established rule that an arbitrator's testimony to impeach an award would not be heard after he has signed it. *Meer Corp. v. Farmella Trading Corp.*, 178 N.Y.S. 2d 784 (McGivern, J.).

AWARD NOT INVALIDATED UNDER NEW YORK STATE LAW BY FAILURE OF ONE OF THREE ARBITRATORS TO SIGN IT SINCE MAJORITY AWARD IS SUFFICIENT. Furthermore, incorrect reference to arbitrator as "umpire" is not "fatal to the award." Said the court: "With regard to the failure of all the arbitrators to participate in the decision, the submission was made pursuant to the laws of the State of New York, and in the absence of an expressly required concurrence, an award by a majority of the arbitrators is sufficient (Sec. 1456, C.P.A.). . . . And even though one of the arbitrators was incorrectly referred to as an umpire, such error is not fatal to the award." *Meer Corp. v. Farmella Trading Corp.*, 178 N.Y.S. 2d 784 (McGivern, J.).

MAJORITY AWARD NOT INVALID UNDER IOWA LAW WHEN CONTRACT PROVIDES FOR LESS THAN UNANIMOUS AWARD. A party-appointed arbitrator refused to sign an award on the amount of hail damage. It was, however, signed by the other party-appointed arbitrator and a neutral. Plaintiff sought to vacate the award for lack of unanimity. The contract provided that the two party-appointed arbitrators "shall *if necessary* choose a third." The court said: "The law seems to be quite well settled that where a controversy of a private character is submitted to the decision of several persons, the finding or award of such persons, to be valid, must be concurred in by all unless by express terms or by fair implication, a decision by less than the whole number is contemplated by the parties to the submission." The court then interpreted the words "if necessary" to mean that a third arbitrator was to be chosen only if the two party-appointed arbitrators disagreed and therefore it is implicit that a unanimous award was not necessary, since one arbitrator would always disagree with the decision. *Twait v. Farmers Mutual Hail Insurance Co. of Iowa,* 91 N.W. 2d 575 (Sup. Ct. of Iowa, Garfield, Ch. J.).

V. ARBITRATION PROCEEDINGS

UNSIGNED CARBON COPY OF LETTER FROM APPRAISER TO APPELLANT CONTAINING HIS ESTIMATE HELD ADMISSIBLE AS EVIDENCE OF THE AWARD. Appellant, in a suit on an excavation contract, contended that copy violated the best evidence rule, and that its admission meant the introduction of hearsay since the appraiser was not present to be cross-examined about his award. The court rejected both contentions, holding that the letter was properly identified and that "a carbon copy of a letter is considered to be a duplicate original, and, as such, it constitutes primary rather than secondary evidence." Furthermore, "though it is quite true that a letter from a third person would ordinarily be hearsay and hence inadmissible, this letter constituted the award of the arbitrator in the nature of an appraisal, and its genuineness was established by (appellant). Such an award need not be in any particular form . . . Under these circumstances we think the letter was admissible and that the hearsay rule does not bar its use." *Parr Construction Co. v. Pomer,* 144 A. 2d 69 (Maryland Court of Appeals, Brune, Ch. J.).

SELLER HAVING CHOSEN ARBITRATION UNDER AN OPTION CLAUSE CANNOT ABANDON IT AND COMMENCE COURT ACTION. Salesnotes provided for arbitration at the seller's option before the General Arbitration Council of the Textile Industry. The plaintiff instituted arbitration and defendant indicated his willingness to arbitrate. However, the parties were unable to agree on a formulation of the issues and plaintiff instituted a court action. In reversing an order which had denied a motion to stay the proceeding pending arbitration, the Second Circuit Court of Appeals said: "The plaintiff, by virtue of the terms contained in its salesnotes had the option of adjudicating its claims against the defendant either before an arbitration tribunal or in a court of law. Under the law of New York, the place where the contract of sale was made, an option is considered as an

offer which ripens into a contract upon acceptance by the optionee. . . . Once the option has been exercised there is a contract mutually binding upon each of the parties. The optionee cannot withdraw from the contract with impunity any more than the optionor can do so. . . . Hence, when the plaintiff exercised its option by demanding arbitration it took the final step necessary to create a binding arbitration agreement between itself and the defendant. No manifestation of assent by the defendant was necessary." *Calvine Mills v. L. A. Slesinger,* 258 F. 2d 228 (Waterman, J.).

DEFENDANT HAVING REPUDIATED CONTRACT CANNOT SEEK TO ARBITRATE DISPUTES AFTER PLAINTIFF HAS COMMENCED COURT ACTION. Said the court: "Since defendant expressly indicated that he would not abide by the agreement, plaintiff had the choice of accepting the repudiation . . . or of instituting a proceeding to compel arbitration. Plaintiff elected to rely upon defendant's negation of his obligation. . . . Defendant's present demand that plaintiff proceed by way of arbitration is too belatedly interposed, for it is obvious that defendant did not intend to arbitrate and has waived any right he may have had under the now-repudiated agreement to insist upon arbitration." *Nachman v. Nachman,* 12 Misc. 2d 551, 177 N.Y.S. 2d 323 (Levy, J.).

AWARD UPHELD DESPITE FAILURE OF ARBITRATORS TO GIVE NOTICE OF THEIR MEETING TO PARTIES AND WHERE OBJECTING PARTY COULD NOT SHOW THAT HE WAS PREJUDICED BY SUCH FAILURE. The respondent, seeking to vacate the award, charged inter alia that the arbitrators acted improperly. Said the court: "The court finds that there is no competent evidence of fraud or misconduct on the part of the said arbitrators. A reading of their award shows that they carefully considered each point in dispute—the arbitrators, it appears, expended a large amount of time, patience and pains to ascertain the facts, and interviewed all persons who could give information on the disputed items. . . . There is no showing of any injury or harm sustained by the (respondent), because actual notice was not given of the date of any particular meetings of the Board." *Hopkins v. School District No. 40,* 327 P. 2d 395 (Sup. Ct. Montana, Angstman, J.).

PRIME CONTRACTOR UNDER GOVERNMENT CONTRACT WHO INSTITUTED COURT ACTION AGAINST SUBCONTRACTOR'S SURETY DEEMED TO HAVE ELECTED TO WAIVE ARBITRATION OF ITS DISPUTE WITH SUBCONTRACTOR. Both contractors were parties to an agreement which contained an arbitration clause covering "any controversy or claim" arising out of the agreement. The prime contractor sued surety in a New York court for damages caused by subcontractor's alleged breach of the agreement. Subsequently the subcontractor brought suit against the prime contractor for materials and work done. The prime contractor sought a stay of this action in view of the arbitration clause. It contended that the New York action did not involve a party to the arbitration agreement. The subcontractor took the position that the surety stood in its place

and therefore the general contractor had waived arbitration and had given the subcontractor the right to ignore the arbitration clause. In finding for the subcontractor, the court said that by filing its complaint, the subcontractor "then made its election not to arbitrate. Thus, each party elected not to arbitrate, the one by an action in New York for alleged failures on a performance bond, and the other by bringing suit in Indiana for money alleged due for labor and materials under a payment bond, both actions arising out of the same sub-contract." *United States of America for the use and benefit of Frank A. Trucco and Sons Co. v. Bregman Construction Corp.*, 256 F. 2d 851 (Seventh Cir., Hastings, C. J.).

COMMENCEMENT OF UNFAIR LABOR PRACTICE PROCEEDING SUBSEQUENT TO INSTITUTION OF ARBITRATION OF GRIEVANCES HELD NOT TO CONSTITUTE WAIVER OF ARBITRATION. The court, finding that the grievance was arbitrable under the contract, said: "Although the petitioner's conduct constitutes an unfair labor practice as well as a violation of the agreement, that fact does not bar respondent from demanding arbitration while at the same time pursuing unfair labor charges against petitioner. Clearly, the arbitration is confined to a determination of the scope of a contractual right and the breach thereof—issues which are beyond the jurisdiction of the National Labor Relations Board." *Local Union No. 138, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. Embassy Grocery Corp.*, 178 N.Y.S. 2d 844 (Edgar J. Nathan, Jr. J.).

DEFENDANTS WHO IMPLEADED A THIRD PARTY DEFENDANT HELD NOT TO HAVE WAIVED RIGHT TO ARBITRATION. The plaintiff subcontractor commenced an action against defendant contractor whose answer pleaded arbitration and a claim over against the owner. The court held that the defendant's answer evidenced an intent to preserve the arbitration remedy. In distinguishing this case from those where defendant interposes counterclaims, the court said: "In this case, the affirmative claim contained in defendant's answer was *not* a counterclaim against plaintiff, but a claim over against [third party defendant] to protect the defendants if they were unsuccessful in their claim to go to arbitration proper or in the action itself if they were denied arbitration. No waiver of their contractual right to have the controversies between plaintiff and defendants determined by arbitration may be spelled out of the defendant's procedural conduct here." *Kalin Contracting Co. v. Picram Construction Corp.*, 178 N.Y.S. 2d 294 (Shapiro, J.).

COURT WILL NOT PASS ON QUESTIONS OF ARBITRABILITY SUBMITTED TO ARBITRATOR AFTER PARTY PROCEEDED WITH PARTS OF THE CASE ON THE MERITS AND SUBMITTED A BRIEF ON ITS RESERVATIONS. Holding that Art. 84 C.P.A. provides sufficient remedies when arbitrability is in dispute, the Appellate Division said: "Parties ought not to find themselves partly in and partly out of arbitration; and especially does it seem to us inconsistent with the statutory scheme to authorize

a judicial review to move in parallel lines with the arbitration itself as to whether or not some disputed questions lie within the submission. Such a practice imports uncertainty; and it would breed litigation. A statute intended to make perfectly clear how and when judicial relief addressed to arbitration can be obtained ought not to be cast in a procedural penumbra. The builder made clear its reservations about going into arbitration; but when it went in it must be deemed by the court to have yielded the reservation." *Iino Shipbuilding & Engineering Co. v. Hellenic Lines,* 175 N.Y.S. 2d 750 (1st Dept., Bergan, J.).

DEFENDANT WHO AGREED TO STIPULATION EXTENDING PLAINTIFF'S TIME TO CONDUCT EXAMINATION BEFORE TRIAL HELD NOT TO HAVE WAIVED ARBITRATION REMEDY. Defendant's answer contained plea of arbitration. The court said it could not see "any substance to the contention that defendants, by merely stipulating to extend *plaintiff's* time to conduct examinations before trial, thereby ipso facto waived their right to insist on arbitration. It was not their examination; they were not taking any affirmative steps in the action; they were merely acquiescing in certain steps being taken by the plaintiff. Such conduct on their part did not ripen into conduct so extensive in the litigation as to constitute a waiver." *Kalin Contracting Co. v. Picram Construction Corp.,* 178 N.Y.S. 2d 294 (Shapiro, J.).

VI. THE AWARD

AWARD WHICH DID NOT CLEARLY STATE OBLIGATIONS OF THE PARTIES VACATED FOR LACK OF FINALITY AND CONCLUSIVENESS. The Appellate Division, resubmitting the award to the same arbitrators, said: ". . . the award herein leaves open the amount which appellants are obligated to pay, reserves certain other matters to the taking of subsequent oaths and requires a deposit of funds in accordance with the books of one of the parties. These directions are not only indefinite, but the determination of the amounts depends upon more than just arithmetical calculations. Businessmen and accountants can well disagree as to what a set of books shows as being 'due' to a party. An award must be clear enough to indicate unequivocally what each party is required to do. See *Application of Albert J. Pfeffer, Inc.,* 222 App. Div. 62, 225 N.Y.S. 294." *Overseas Distributors Exchange v. Benedict Brothers & Co.,* 173 N.Y.S. 2d 110 (1st Dept.).

AWARD VACATED AND MATTER RESUBMITTED TO ARBITRATOR WHERE COPY OF CONTRACT SUBMITTED IN EVIDENCE DIFFERED FROM TRUE CONTRACT MADE BY THE PARTIES. Holding that "such a mistake would appear to constitute 'other undue means' within the meaning of subdivision 1 of section 1462 of the Civil Practice Act" the court ordered resubmission, since "the difference may very well have affected the award." *Livingston v. Banff, Ltd.,* 178 N.Y.S. 2d 973 (McGivern, J.).

WHEN AWARD IS SILENT AS TO INTEREST IT MAY BE INCLUDED IN THE JUDGMENT OF CONFIRMATION UNDER BROAD ARBITRATION CLAUSE OF CHARTER PARTY. Said the court: "The arbitrators made no mention of interest on the award. I assume in respondent's favor that the question was not presented to them, rather than acted on and denied sub silentio. Nevertheless, a claim for interest is part of the asserted damages." In looking to the scope of permissible issues before the arbitrators, under the clause covering "any dispute," the court said: "This was a broad submission. Respondent cities no case which would suggest that it excluded the issue of the right to interest on the obligation." The latter being a liquidated debt, the court held the respondent entitled to interest on the award from the date thereof. *Aegean (Shipbrokers) Ltd. v. Henriksen's Rederi A/S,* 165 F. Supp. 939 (D. Mass., Aldrich, D. J.).

APPRAISERS' INTERPRETATION OF AUTHORITY HELD NOT CONCLUSIVE ON PARTIES SINCE IT INVOLVES CONSTRUCTION OF CONTRACT SUBJECT TO REVIEW BY COURT. A real estate rental lease provided for appraisal according to a contractual formula with the appraisal binding upon lessor and lessee "as to the rental value of the leased premises." The dispute arose over the interpretation of the word "land" in the formula. The appraisers held it to mean a single lot covered by the lease, whereas the landlord contended it meant the entire tract, thus involving two adjacent lots. The court said: "In effect arbitrators are private judges whose powers are defined by contract and to a degree by custom. Appraisers, by definition perform a narrower function, that merely of fixing value. But in either case—whether appraisers or arbitrators—they do not bind principals or contracting parties when they go beyond the authority delegated to them. When they exceed that authority their decision in the area of that departure is not binding; their interpretation of their charter of authority, unlike the valuation, is subject to judicial review." *Marceron v. Chevy Chase Services,* 258 F. 2d 155 (C.A. Dist. Col., Burger, C. J.).

PARTY STIPULATING DURING COURT ACTION TO ARBITRATE DISPUTE CANNOT AVOID AWARD BY CLAIMING ARBITRATION DID NOT CONFORM TO CALIFORNIA STATUTE. At the trial on a construction dispute the parties entered into a stipulation in open court to air their dispute before a named arbitrator who would report his findings to the court. When the report was filed in the trial court, plaintiff claimed that the provisions of the arbitration statute had not been followed. The court, in rejecting this contention, stated that the plaintiffs "specifically and definitely agreed to be bound" by the findings and report of the arbitrator. Thus, by their own act, they took this arbitration from the operative effect of the sections of the Code of Civil Procedure. Obviously, they had the right to do so. They must accept the report, the findings of fact, conclusion of law and judgment based thereon. . . . Appellants by entering into the stipulation cannot complain of what they caused the court to do . . . The stipulation being a form of an agreement or contract the trial court and the appellate court are bound by it." *Palestis v. Weber & Miller,* 161 A.C.A. 537, 327 P. 2d 52 (Cal. App., 4th Dist., McCabe, J.).

APPRAISAL AWARD HELD TO BE CONCLUSIVELY OF FACT ISSUES IN SUBSEQUENT PLENARY SUIT ON THE CONTRACT. An excavator agreed to submit the issue of how much material he had excavated from a construction site to an impartial engineering consultant. After the award was rendered he instituted suit on the original cause of action, rather than on the award. Deeming the arbitration to be in the nature of an appraisal, the court quoted from 6 Williston, Contracts (rev. ed.) sec. 1927, p. 5387: "When the award is in the nature of an appraisal and merely determines questions of fact, suit will still lie on the original cause of action, but the award, in the absence of vitiating circumstances, is conclusive evidence of the facts found." *Parr Construction Co. v. Pomer,* 144 A. 2d 69 (Maryland Court of Appeals, Brune, Ch. J.).

AWARDS IN FAVOR OF TWO SUBCONTRACTORS HELD BAR TO GENERAL CONTRACTOR'S INTERPLEADER ATTEMPT IN SUBSEQUENT FEDERAL COURT ACTION. In two separate arbitrations the general contractor was ordered to pay the electrical and mechanical subcontractors for work which was, contrary to general contractor's position, held to be extra and outside the contract. Refusing the payment, the general contractor commenced an interpleader court action joining both subcontractors on the theory that one of them was responsible for the extra work. In affirming a summary judgment against the contractor, the court held that the general contractor was "bound by the two arbitration awards, which held that neither subcontractor was obligated to do the disputed work . . . [the general contractor] apparently reasoned that, since the items were embraced in the general contract, they were included in one or the other of the two subcontracts, despite the decisions of the arbitrators. Because of this erraneous assumption, they created what was in fact an artificial fund in hand with fictional adverse claimants thereto, by withholding an amount equal to the cost of the extra items from moneys due under each of the subcontracts. In these circumstances interpleader did not lie." *Charles H. Tompkins Co. v. Lloyd E. Mitchell,* 259 F. 2d 177 (C.A., Dist. Col., Miller, C. J.).

AWARD CONTAINING FORMULA FOR COMPUTING COMMISSIONS ON CERTAIN TENTATIVE ORDERS HELD DEFINITE AND FINAL. An award concerning the transfer of large sums of money, listed in addition certain tentative orders that were in process, and stated that commissions to respondent were to be ten percent if the order was accepted by the plaintiff. Respondent contended that the award was defective under Sec. 1462(4) N.Y. C.P.A. Said the Second Circuit Court of Appeals, in affirming: "The Award is definite and final in every respect. The arbitrators resolved all questions of amounts due, and they laid down specific and easily understood conditions precedent whereby additional specific amounts would or would not become due. As for the tentative orders and the commissions which might become due, the formula was clear and the computation is simple arithmetic. The New York Courts have many times held such awards to be sufficiently definite." *Hetherington & Berner v. Melvin Pine & Co.,* 256 F. 2d 103 (C.A. 2d, Lumbard, C. J.).

MARYLAND COURT OF APPEALS HOLDS ARBITRATOR'S DECISION ON THE AMOUNT OF MATERIAL EXCAVATED AT A CONSTRUCTION SITE TO BE IN THE NATURE OF AN APPRAISAL. Said the court: "The question to be determined by the arbitrator was purely one of quantity. It was essentially of the same character as an appraisal." *Parr Construction Co. v. Pomer,* 144 A. 2d 69 (Maryland Court of Appeals, Brune, Ch. J.).

AWARD WHICH DISPOSES OF ALL CLAIMS AND COUNTERCLAIMS IS VALID EVEN THOUGH IT DOES NOT STATE IN SO MANY WORDS THAT AMENDED CONTRACT AND COUNTERCLAIM WERE CONSIDERED. Petitioner sought to vacate the award, claiming that the arbitrators had failed to consider a certain letter amending the original contract as well as a counterclaim. These contentions were denied by the other party-appointed arbitrator and the neutral, both of whom concurred in the award. The court said: "Convincing evidence must be shown to rebut the presumption that the arbitrators did their duty. On the showing before the court such proof is lacking. . . . No particular words are necessary to comply with section 1460 of the Civil Practice Act. From the papers submitted, it appears that the complete disputes were considered and disposed of, and although the award is inartistically drawn, it is in proper form for confirmation." *Meer Corp. v. Farmella Trading Corp.,* 178 N.Y.S. 2d 784 (McGivern, J.).

FEDERAL COURTS HAVE JURISDICTION TO CONFIRM AWARD WHERE PARTIES OF DIVERSE CITIZENSHIP (INDIANA AND FLORIDA) AGREED TO ARBITRATE AND BE BOUND BY THE LAWS OF NEW YORK STATE. Parties had stipulated in a court action to arbitrate in New York but the respondent sought to have the award vacated in the Supreme Court of New York, claiming that the contract clause made the state court the only forum. In rejecting this contention, the Second Circuit Court of Appeals affirmed the award, saying: "The appellants' contention that [plaintiff] consented to exclusive jurisdiction of the New York state courts by reason of the provision in the contract that New York Law was to govern is, of course, absurd on the face of it. And the further argument that, by stipulating in the federal court action that the arbitration would take place in the State of New York, [plaintiff] had agreed that only the New York State courts should have jurisdiction over the resulting award is equally farfetched as it would be contrary to the obvious purpose of the stipulation, namely that the arbitration was to be under the aegis of the federal court." *Hetherington & Berner v. Melvin Pine & Co.,* 256 F. 2d 103 (C.A. 2d, Lumbard, C. J.).

AWARD GRANTING BACK PAY BEYOND THE DATE OF FILING WRITTEN JOB EVALUATION GRIEVANCE UPHELD AS PERMISSIBLE INTERPRETATION OF CONTRACT. The employer sought to modify the award rating a certain job, claiming that the contract specifically

limited the retroactivity of "a grievance concerning a rate of pay" to the date when a written grievance was presented. The union contended that the issue involved job classification rather than wage rates. The arbitration clause covered the interpretation of the terms and intent of the contract. The court, holding that the question of whether a job classification was the same as a wage rate was for the arbitrator to decide, said: "The terms of the collective bargaining agreement in this case do not lack ambiguity. Since there was a question of interpretation of the contract present, the court will not review alleged errors in the decision on questions of fact or law." The employer's motion to modify the award was therefore denied. ***Auburn Plastics v. Federal Labor Union Local No. 20538, AFL-CIO,*** 173 N.Y.S. 2d 361 (Henry, J.).

AWARD WHICH FAILED TO REFER TO COUNTERCLAIM REMANDED TO ARBITRATORS FOR REHEARING. "Although the two arbitrators making the award, by affidavits . . . assert that full and careful consideration was given to all matters submitted, including the counterclaim, the award . . . on its face fails to make any reference to the counterclaim interposed, and is consequently defective (sec. 1462(5) C.P.A.; *Hoffman v. Greenberg Co., Inc.,* 109 Misc. 170, 172). The court in its discretion, directs a rehearing before the same arbitrators. At the rehearing the arbitrators may either receive new evidence or rely on the evidence submitted at the prior hearing." *Meer Corp. v. Farmella Trading Corp.,* 178 N.Y.S. 2d 784 (McGivern, J.).

COURT AFFIRMS AWARD GRANTING UNION RIGHT TO INSPECT BOOKS OF ASSOCIATION MEMBER, since union had such right under agreement. *Minkoff v. Anzio Frocks, Inc.,* N.Y.L.J., Feb. 17, 1958, p. 8 (Gold, J.).

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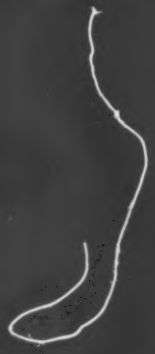

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Domke, ed. International Trade Arbitration: A Road to World-Wide Cooperation, 320 pp. $4.50

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